Rule 11 and State Courts: Panacea or Pandora's Box?

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INTRODUCTION

Panacea: Rule 11 helps everyone; it eliminates the "pure heart, empty head" excuse for sloppy lawyering. *Pandora's Box*: Rule 11 intensifies in-fighting and spawns litigation; it is a "major threat" especially to individual litigants and small law firms. How might state courts concerned about wasteful litigation address these colliding views of Rule 11? Let's begin with two stories.

Story #1. Imagine a clear day. A well-traveled private road. An adult male driving his jeep. 5:00 p.m. Sun setting outside of driver's line of vision. He drives over an ordinary speed bump at fifteen miles an hour and, he asserts, sustains serious injuries. His grandmother passenger is uninjured. The speed bump is in plain view. He had previously driven over that same speed bump at least eighty times. Several years earlier the driver had received a $25,000 settlement arising out of an unrelated auto incident.

Driver finds an attorney to file suit in 1989. Two-and-a-half page bare-bones complaint. Ultimate claim for lost wages exceeds $70,000. Negligent design, placement and maintenance of the speed bump. Driver knew its location. He tells the attorney that the sun reflected off a man-hole cover; he could not see the bump; a warning sign was needed. Attorney conducts no independent investigation before filing.

Discovery commences. Interrogatories, document requests, plaintiff's deposition. The case is dismissed for plaintiff's failure to timely file a pretrial statement, then reinstated. Seventeen months after service, defendant files its summary judgment motion. Eighteen page memo in support, three exhibits, three affidavits. Defendant's expert engineer's affidavit states that the manhole cover's shape and finish prevented sunlight reflection. Defendant's expert meteorologist's affidavit states that the sun set that day out of plaintiff's sight line.

The motions judge grants summary judgment. Plaintiff pays nothing to its attorney. Defendant pays its attorneys full fare. No appeal.[1]

End of story.

Story #2. Imagine a breach of contract action. Critical issue—what the parties' contemplated regarding defendant's performance obliga-

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[1] This story is a hypothetical composite of various cases. It does not recount the actual conduct of any particular parties.

tions. Ambiguous written language. Conflicting oral statements. Part way through discovery, defendant files a summary judgment motion asserting plaintiff's lack of evidence on the issue of "intent." Three page memorandum. Defendant proffers no specific evidence in support. Clear loser. Plaintiff must nevertheless respond by producing, organizing and arguing *all* evidence (including plaintiff's evidence not yet discovered by defendant) in support of plaintiff's position, and couch its arguments in the context of plaintiff's legal theories.[2] Defendant's summary judgment motion is denied. Inexpensive and potentially valuable discovery for defendant. Considerable headache and expense for plaintiff and plaintiff's counsel. Substantial court time.

End of story.

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But no longer. The stories have an epilogue. Former Rule 11's subjective bad faith standard for sanctioning "frivolous" filings has been replaced with an objective reasonableness standard. In all likelihood, the new standard, as interpreted by most federal courts, would authorize sanctions against plaintiff's counsel, and possibly the plaintiff, in our first story and sanctions against defendant's counsel in our second story.

What about state courts such as Hawaii's that have recently adopted the federal version of Rule 11?[3] Would sanctions be appropriate? Desirable? What are the immediate and long-term benefits and problems? What can be learned by state courts from federal court experience with Rule 11?

Eight years have passed since the amendment of federal Rule 11. Federal court experience with Rule 11 during those years has generated considerable inquiry and commentary. The debate has sometimes been heated. No definitive description of the impact of federal Rule 11 on law practice has emerged. Available empirical data and inquiry into values underlying Rule 11, however, point to general conclusions about federal court experience that might guide state courts in the interpretation and application of Rule 11.

Rule 11 in federal courts deters careless and ill-conceived filings to a measurable extent.[4] Rule 11 has made attorneys "stop, look and

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[2] *See* Munoz v. Yuen, 66 Haw. 603, 670 P.2d 825 (1983).

[3] The Hawaii Supreme Court adopted the federal version of Rule 11, effective September 1, 1990.

[4] Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1015 (1988) [hereinafter

inquire" before filing.[5] That is for the better. Fewer meritless positions are asserted and litigated. Groundless motions and nuisance value claims are discouraged. The system no longer need tolerate the baseless summary judgment motion or the personal injury claim for the negligent placement of an ordinary, visible speed bump over which plaintiff had previously driven 80 times.

Federal Rule 11's curb on "litigation abuse," however, has come at an apparently steep price. Judges, attorneys, litigants and scholars complain about excessive Rule 11 litigation,[6] about heightened adversariness, about Rule 11 as a strategic weapon, about the inhibition of creative lawyering and about diminished access to the courthouse for "marginal" litigants.[7] In particular, early empirical research suggests a disproportionate impact upon small plaintiffs and plaintiffs' attorneys.[8] For example, an attorney in a small plaintiffs-oriented firm recently faced six Rule 11 motions in litigating various employment discrimination cases in federal and state courts. The sanction requests were filed by defense counsel from large firms as one paragraph tag-alongs

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Schwarzer, *Revisited*] (Rule 11 "has certainly deterred some frivolous, wasteful or abusive litigation"); *accord* Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L.L. REV. 341, 362 nn.100-02 (1990) [hereinafter Yamamoto, *Efficiency's Threat*).

[5] Yamamoto, *Efficiency's Threat*, *supra* note 4, at 362.

[6] Vairo, *Rule 11: A Critical Analysis*, 1118 F.R.D. 189, 199 (1988). Professor Vairo notes that "[p]rior to 1983, there were only a handful of reported Rule 11 decisions. Between August 1, 1983 and December 15, 1987, 688 Rule 11 decisions have been reported, 496 district court opinions and 192 circuit court opinions." According to Judge Schwarzer, aside from the reported decisions, "there are presumably many more unreported rulings granting or denying sanctions under rule 11." Schwarzer, *Revisited*, *supra* note 4, at 1013. Similarly, a search through LEXIS reveals that since 1989, 294 decisions dealing with Rule 11 have been handed down in the federal circuit courts alone. (LEXIS, Genfed library, Cir files). *See* Section III(A), *infra*.

[7] Yamamoto, *Efficiency's Threat*, *supra* note 4, at 365, 370 (quoting Judge Carter, "Rule 11 has not been wielded neutrally and . . . applications of the rule evince 'extraordinary substantive bias' against certain minority claims"). Another commentator "argues that courts have applied amended rule 11 too broadly as a tool for docket management and that they have thus, in many cases, undermined the value of open access to court embodied in the liberal pleading regime of the Federal Rules of Civil Procedure." Notes, *Plausible Pleadings: Developing Standards For Rule 11 Sanctions*, 100 HARV. L. REV. 630, 632 (1987). Similarly, Professor LaFrance states that "Rule 11 now represents a direct challenge to congressional policy, of nearly fifty years' duration, that the courts should be open, not closed, to the public." LaFrance, *Federal Rule 11 And Public Interest Litigation*, 22 VAL. U.L. REV. 331, 345 (1988).

[8] *See infra* text accompanying note 232-41.

at the end of defendants' memos in opposition to motions filed by the attorney. The attorney actually prevailed on some of the underlying motions. All sanction requests against the attorney were denied.[9] All drained resources from the attorney's firm. Most, to some extent, placed the firm's survival at risk. The attorney characterized those "routine" sanction requests as "major threats" against individual litigants and small firms.[10]

Rule 11's identified problems in federal courts are traceable to several sources. Three are particularly relevant to state courts. First, several federal courts have established low thresholds for finding Rule 11 violations, thereby encouraging Rule 11 litigation;[11] second, disagreements among the federal circuits about the construction and application of the rule have inhibited the development of uniform standards about technical aspects of the rule;[12] and third, conflicts about values of court access have led to sharply divergent conceptions of the appropriate impact of the rule upon "marginal" social and political groups and attorneys likely to represent them.[13] For these reasons, Judge Schwarzer commented that "[i]n interpreting and applying rule 11, the federal courts have become a veritable Tower of Babel."[14]

These problems have compelled some commentators to advocate repealing the federal rule entirely.[15] Others strongly urge guidelines to restrict Rule 11's application.[16] Still others perceive the rule's overall

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[9] The prematurely filed Rule 11 motions themselves would appear to be subject to Rule 11 sanctions. *See infra* text accompanying notes 139-40.

[10] Interview with attorney licensed to practice in the state of Hawaii, November 26, 1990.

[11] *See generally* Yamamoto, *Efficiency's Threat*, *supra* note 4, at 361 *et seq.* For a discussion see *infra* Part 111(A).

[12] Schwarzer, *Revisited*, *supra* note 4, at 1013 (citing lack of predictability and the excessive amount of litigation the rule generates as the two major problems associated with Rule 11); *accord* Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFFALO L. REV. 485, 508 (1988) ("inconsistent application has fostered unpredictability, while lack of predictability and the willingness of lawyers to employ rule 11 for strategic purposes and to recoup attorney's fees have led to excessive litigation and corresponding delay and waste").

[13] *See* Yamamoto, *Efficiency's Threat*, *supra* note 4, at 345, 370; LaFrance, *supra* note 7, at 333; Tobias, *supra* note 12, at 487.

[14] Schwarzer, *Revisited*, *supra* note 4, at 1015.

[15] Tobias, *supra* note 12, at 524. *See also* LaFrance, *supra* note 7, at 354.

[16] Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383, 385 (1990) [hereinafter Nelken, *Chancellor*] (advocating amendment); Untereiner, *A Uniform Approach to Rule 11 Sanctions*, 97 YALE L.J. 901 (1988) (suggesting possible guidelines).

operation as salutary and encourage only minor tinkering.[17] The Federal Rules Advisory Committee itself has formally called for comments on several Rule 11 issues, and amendments to amended federal Rule 11 may be in the offing.[18]

Is Rule 11 a pancea or pandora's box? And what does all this mean for state courts adopting federal Rule 11? Simply put, how can state courts draw upon federal court experience to realize the benefits and minimize the problems of Rule 11? Federal and state courts differ in many respects. Some federal court experiences will shed little light on likely state court experience. Other federal court experiences, however, address the heart of interpretive problems likely to be encountered by state courts. One premise of this article is that state courts can learn from but need not recreate federal court experience with Rule 11. This article addresses potential state court experiences with Rule 11 by focusing on the Hawaii state court system. The Hawaii court system has a special opportunity to remake Rule 11 in its own image.[19]

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[17] *See generally* Schwarzer, *Revisited*, *supra* note 4.

[18] Advisory Committee's Call for Comments on Rule 11 (July 24, 1990). The joint comments submitted by section leaders of the Litigation Section of the American Bar Association provide a flavor of the response to the call. Eighty percent of the section leaders responding to a questionnaire indicated that the cost of Rule 11 proceedings, both financial and professional, had exceeded its benefit. Around half favored amending the rule. Thirty-seven percent favored outright repeal. Only ten percent favored retaining the rule as is. 16 A.B.A. LITIG. NEWS 4 (Feb. 1991).

[19] There are only two reported Rule 11 cases from the Hawaii state courts, both arising prior to the recent amendment to the rule. *See* Tobosa v. Owens, 69 Haw. 305 (1987), 741 P.2d 1280 (1987); Salud v. Financial Sec. Ins. Co., Ltd., 7 Haw. App. 329, 763 P.2d 9 (1988). A third case, Coll v. McCarthy, No. 14105 (Haw. Jan. 11, 1991), decided by the Hawaii Supreme Court, cites new Rule 11 without discussion and without employing it as the basis of decision.

The recent Rule 11 cases discussed in this article are from the several federal circuits. Reported Hawaii cases emanating out of the Ninth Circuit include Maisonville v. F2 Am., Inc., 902 F.2d 746 (9th Cir. 1990) (sanctions affirmed for a frivolous motion for reconsideration); Peabody v. Maud Van Cortland Hill Schroll Trust, 892 F.2d 772 (9th Cir. 1990), *cert. denied*, 110 S.Ct. 3216 (1990) (sanctions affirmed for filing a second removal petition); Lloyd v. Schlag, 884 F.2d 409 (9th Cir. 1989) (sanctions affirmed against client for a good faith mistake of law and for premature filing of an action); *In re* Hawaii Federal Asbestos Cases, 871 F.2d 891 (9th Cir. 1989) (sanctions affirmed for a motion for summary judgment not well grounded in facts and law); Soules v. Kauaians For Nukolii Campaign Committee, 849 F.2d 1176 (1988) (sanctions against plaintiff reversed despite plaintiff's similar unsuccessful arguments in opposition to developer's intervention in a similar prior state court action).

Reported Rule 11 cases from the United States District Court for the District of

In 1987, Professor Yamamoto discussed the potential role of managerial judges in the Hawaii state court system.[20] Hawaii's court-annexed arbitration program and other alternative dispute resolution programs siphon away many of the smaller, less complicated cases formerly handled by the circuit courts, leaving the courts with a greater proportion of cases suited potentially to some type of qualitative judicial management. Yamamoto viewed the federal version of Rule 11 potentially as one aspect of civil judges' managerial powers.[21]

> Rule 11 provides the managerial judge with the authority to control "unreasonable" filings (pleadings and motions) through the application of a tighter standard for sanctioning frivolous filings . . . . By design, this modestly heightens attorney responsibility to conduct an initial investigation, reduces stress on the court and litigants and minimizes costly future fighting over meritless positions. *Assuming a sensitive judicial touch*, this can be achieved without returning to the byzantine intricacies of a code pleading system and without limiting access to the courts or . . . inhibiting the assertion of novel yet plausible theories of law.[22]

According to this view, Rule 11 may bear potential managerial benefits for Hawaii's courts, provided that the rule is properly conceived and sensitivity applied. In Part III of this article, we draw upon approaches of the Third, Fifth and Ninth Circuit Courts of Appeal and develop our view of a "proper conception" of Rule 11—that it is most appropriately viewed as an extraordinary remedy to be cautiously employed; that its operation is salutary if, but only if, the rule is limited to deterring clearly ill-conceived or improperly motivated fil-

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Hawaii include National Consumer Coop. Bank v. Madden, 737 F. Supp. 1108 (D. Haw. 1990); Wangler v. Hawaiian Elec. Co., 742 F. Supp. 1458 (D. Haw. 1990); *In re* Anthony Greco, 113 Bankr. 658 (D. Haw. 1990); GWC Restaurants, Inc. v. Hawaiian Flour Mills, 691 F. Supp. 247 (D. Haw. 1988); Robinson v. Ariyoshi, 676 F. Supp. 1002 (1987); Lapin v. United States, 118 F.R.D. 632 (1987); All Hawaii Tours v. Polynesian Cultural Center, 116 F.R.D. 645 (1987); Great Hawaiian Fin. Corp. v. Aiu, 116 F.R.D. 612 (1987); Bush v. Rewald, 619 F. Supp. 585 (D. Haw. 1985).

The foregoing list of cases is based upon a LEXIS search and an examination of additional sources. The list is not exhaustive.

[20] Yamamoto, *Case Management and the Hawaii Courts: The Evolving Role of the Managerial Judge in Civil Litigation*, 9 U. HAW. L. REV. 395 (1987) (hereinafter, Yamamoto, *Case Management*).

[21] *Id.* at 455.

[22] *Id.* at 405. (emphasis added).

ings.[23] As the Ninth Circuit recently stated, sanctions should be "reserve[d] . . . for the rare and exceptional case where an action is clearly frivolous . . . or brought for an improper purpose."[24] Rule 11 is "not a panacea intended to remedy all manner of attorney misconduct."[25]

Much has changed since Yamamoto's 1987 article, and more information is available now. One goal of this article, therefore, is to update and rethink technical aspects of Yamamoto's 1987 article.[26] Another

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[23] This conception of Rule 11 is one of several. It places high value on court access. Reasonable arguments can be advanced for other conceptions that encourage more frequent use of the rule. We endeavor to address those arguments throughout Sections II and III.

Other state courts have generally embraced this limited conception of the sanctioning process. California and Illinois state courts, for example, have experienced substantial sanctioning litigation. Both court systems generally have adopted an "extraordinary remedy" approach to sanctions in part to minimize sanctioning litigation and its adverse effects.

California courts have interpreted California's statute authorizing sanctions for "bad faith actions" or "frivolous tactics" to require a finding of bad faith in all instances. Summers v. City of Cathedral City, 225 Cal. App. 3d 1047, 275 Cal. Rptr. 594 (Cal. App. 4 Dist. 1990). Frivolousness is thus equated to bad faith. The rationale for this limiting approach is that: "(a) an action that is simply without merit is not by itself sufficient to incur sanctions; (b) an action involving issues that are arguably correct, but extremely unlikely to prevail should not incur sanctions; and (c) sanctions should be used sparingly in the most egregious conduct situations." *In re* Marriage of Flaherty, 31 Cal. 3d 637, 650, 183 Cal. Rptr. 508, 646 P.2d 179 (1982). Even those decisions defining frivolousness as something less than subjective bad faith recognize a high threshold for sanctioning. *See* On v. Cow Hollow Properties, 222 Cal. App. 3d 1568, 272 Cal. Rptr. 535 (Cal. App. 1 Dist. 1990) (applying an objective test to determine whether the filing was totally and completely without merit or for the sole purpose of harassment).

The Illinois court system's sanctioning rule initially followed Federal Rule 11. It was amended as Rule 137 in 1989 to soften its harsh effects. The amendment made the imposition of sanctions discretionary upon a finding of a violation of the reasonableness standard—the federal rule mandates sanctions. In addition, the Illinois courts have imposed procedural safeguards to prevent strategic misue of the sanctioning rule. *See* Geneva Hosp. Supply, Inc. v. Sanberg, 172 Ill. App. 3d 960, 527 N.E.2d 611 (1988) (requiring the party seeking sanctions to support its motion with specific facts and argument). As a practical matter, Illinois courts have employed Rule 137 and its predecessor sparingly. Timberlake & Plonk, *Attorney Sanctions in Illinois Under Illinois Supreme Court Rule 137*, 20 LOY. U. CHI. L.J. 1027, 1048 (1989). We thank Norman Kato for his research on these issues.

[24] Operating Eng'rs Pension Trust v. A-C Co., 859 F.2d 1336 (9th Cir. 1988).

[25] Zaldivar v. City of Los Angeles, 780 F.2d 823, 829 (9th Cir. 1986).

[26] The 1987 article's generally salutary although somewhat cautious tone is trans-

goal is to offer a conception of Rule 11 for the state courts that addresses salient criticisms of federal Rule 11.

Part I provides a brief history and discusses the purposes of federal Rule 11. Part II attempts to clarify selected Rule 11 technical issues, to reconcile conflicting federal circuit court positions on those issues and to suggest an interpretive path for the Hawaii courts.

Part III addresses two problematic consequences of Federal Rule 11: 1) excessive Rule 11 litigation and heightened adversariness, and 2) the inhibition of common law development and the discouragement of court access. To address these problems Part III suggests that state courts such as Hawaii's quickly adopt firm guidelines for Rule 11 *and* embrace the concept of Rule 11 as an exceptional remedy for only clearly inappropriate filings.

I. History And Purpose: An Emphasis On Deterrence

What are Rule 11's purposes? Three different purposes have been espoused: deterrence, compensation and punishment.[27] Is one purpose more important than the others? An early study revealed that many judges tended to ascribe multiple purposes to Rule 11 and that, as a partial result of the purpose emphasized, the sanctions selected varied in type and severity.[28]

The United States Supreme Court clarified recently that the central purpose of federal Rule 11 is to "deter baseless filings."[29] This deterrence rationale is consistent with the views of most of the federal circuits,[30] the comments of the Advisory Committee[31] and the overall

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formed here into an approach of substantial caution. More problems have materialized than initially anticipated. *See* Yamamoto, *Case Management*, *supra* note 20.

[27] Untereiner, *supra* note 16, at 905. (citations omitted).

[28] *See* Kassin, *An Empirical Study of Rule 11 Sanctions* (Federal Judicial Center 1985); *see also* Untereiner, *supra* note 16, at 906.

[29] Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447, 2454 (1990).

[30] Oliveri v. Thompson, 803 F.2d 1265, 1281 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987); *In re* Kunstler, 914 F.2d 505, 522 (4th Cir. 1990); Thomas v. Capital Sec. Inc., 836 F.2d 866 (5th Cir. 1988) (*en banc*); Pantry Queen Foods v. Lifschultz Fast Freight, 809 F.2d 451, 454 (7th Cir. 1987); Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1141 (9th Cir. 1990) (*en banc*); Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987) (*en banc*); *But see* Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 934 (1988).

[31] The Advisory Committee's note states that "[t]he word 'sanctions' in the caption . . . stresses a deterrent orientation in dealing with improper pleadings, motions, and other papers." Fed. R. Civ. P. 11 advisory committee's note.

efficiency emphasis of federal procedural reforms.[32] Commentators also generally agree that deterrence, rather than compensation or punishment, should be the rule's primary goal.[33] A consensus has thus developed that the federal rule's primary purpose is to make attorneys "stop, think and inquire" before filing, not to shift litigation expenses from winner to loser, and not to inflict punishment. Of course, a sanction in the form of attorneys' fees may be compensatory in effect, and any sanction will be viewed as a form of punishment of the rule violator. Compensation and punishment, however, are now viewed in federal courts as incidents to sanctions imposed to make attorneys think and inquire before filing.

To achieve its purpose the federal rule was amended in 1983 to create a sharp "disincentive for careless or abusive filings."[34] The Advisory Committee commented then that the rule's new objective reasonableness standard for defining frivolousness "is more stringent than the original good faith formula and thus it is expected that a greater range of circumstances will trigger its violation."[35] There is no longer a "pure heart, empty head" excuse for misfilings.[36]

The rule change attempted to address a multitude of apparent litigation sins. The connecting thread among those sins: the use of tenuously grounded filings to gain a strategic litigation advantage. This encompassed a plaintiff's filing of a completely meritless complaint to generate nuisance value as well as a powerful defendant's blitzkrieg of unnecessary motions and discovery filings to overwhelm a plaintiff (and plaintiff's attorney) possessing limited resources.

The rule change also emphasized attorneys' dual loyalties—as zealous advocates on behalf of clients *and* as officers of the court in pursuit of justice.[37] By clarifying attorneys' loyalties and by focusing on attorney

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[32] *See* Yamamoto, *Efficiency's Threat*, *supra* note 4; Tobias *supra* note 12; Yamamoto, *Case Management*, *supra* note 20.

[33] For commentators in accord, see Schwarzer, *Revisited*, *supra* note 4, at 1020; Vairo, *supra* note 6, at 203; LaFrance, *supra* note 7, at 351; Untereiner, *supra* note 16, at 904; and Nelken, *Chancellor*, *supra* note 16, at 399.

[34] Yamamoto, *Case Management*, *supra* note 20, at 432. For a discussion of the history of amended federal Rule 11, see *id.* at 428-31.

[35] *Id.* at 432.

[36] Zaldivar v. City of Los Angeles, 780 F.2d 823, 829 (9th Cir. 1986).

[37] *See* Unanue-Casal v. Unanue-Casal, 898 F.2d 839, 842 (1st Cir. 1990)("While [a lawyer] must provide 'zealous advocacy' for his client's cause, we encourage this only as a means of achieving the court's ultimate goal, which is finding the truth")(elipses

conduct, the rulemakers hoped to employ Rule 11 along with other amended rules to achieve the larger goal of improved systemic efficiency.[38]

II. Technical Issues

The text of Rule 11 raises three "interconnected and interpretive issues." Specifically, 1) *What* conduct is sanctionable? 2) *Who* should be sanctioned? 3) *Which* type of sanction is appropriate.[39] These primary issues, referred to here as "technical issues," will be addressed in turn along with other subsidiary Rule 11 issues concerning the timing of sanction motions, due process, the standard of appellate review, frivolous appeals, voluntary dismissals, malpractice and removal.

A. Sanctionable Conduct

Rule 11 scrutiny is triggered when an attorney or party signs and files a "pleading, motion or other paper."[40] Under amended Rule 11:

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in original); Robinson v. National Cash Register Co., 808 F.2d 1119, 1131 (5th Cir. 1987)("while enthusiasm and innovation in advocacy are to be encouraged, an attorney is under a correlative obligation to conduct himself in a manner consistent with the proper functioning of the judicial system"); Mars Steel Corp. v. Continental Bank, N.A., 880 F.2d 928, 932 (7th Cir. 1989)(*en banc*)("The legal system creates duties to one's adversary and to the legal system. . . . The duty to the legal system . . . is to avoid clogging the courts with paper that wastes judicial time and thus defers the dispositions of other cases or, by leaving judges less time to resolve each case, increases the rate of error.").

[38] Rule 11 is now to be viewed as part of the "general effort by the courts and Congress to address delay and expense in civil proceedings caused by various inappropriate litigation tactics." Zaldivar v. City of Los Angeles, 780 F.2d 823, 829, n.5 (9th Cir. 1986). Federal Rules 16 and 26 were also amended in 1983 to address problems of delay and excessive cost. *Id.* Hawaii Rules of Civil Procedure 26(b)(1), 26(f) and 26(g) were amended in 1990 along with Rule 11 to conform to the amended federal rules.

[39] Untereiner, *supra* note 16, at 905.

[40] The term "other paper" is not one that will generally cause confusion in applying Rule 11. However, what constitutes an "other paper" merits some attention simply because Rule 11 was not meant to govern every aspect of a litigation. The Ninth Circuit attempted to clarify the scope of papers governed by Rule 11 in *Zaldivar*, 780 F.2d at 830, by discussing when Rule 11 should not apply. The Court noted that Rule 11 is not "properly used to sanction the inappropriate filing of papers where other rules more directly apply." For example, Rule 26(g) is the appropriate vehicle to sanction abusive discovery requests and Rule 56(g) deals with affidavits for motions for summary judgment. The court cautioned that "[t]o apply Rule 11 literally to all papers filed in the case, including those which are the subject of special rules, would risk the denial of the protection afforded by those special rules."

> The signature of the attorney constitutes a certificate by the signer that the signer has read the pleading, motion or other paper, that to the best of the signer's knowledge, information and belief *formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose*, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.[41]

By *signing* a pleading, motion, or other paper, the attorney or party *certifies* two things: 1) she has conducted reasonable inquiry and determined that the filing is well grounded in fact and warranted by prevailing law or a plausible argument for change in law (sometimes referred to as the "frivolousness" clause of the rule); *and* 2) the filing is not filed for a purpose that is "improper" (sometimes referred to as the "improper purpose" clause of the rule).[42]

The key to sanctionable conduct under Rule 11 is thus the "frivolousness" and "improper purpose" certification requirements.[43] The attorney or party who signed the filing is sanctionable if she signed the filing in violation of either certification requirement.[44] In *Zaldivar v. City of Los Angeles*, the Ninth Circuit observed that since Rule 11 provides that a filing must be "well grounded in fact and . . . warranted by existing law . . . *and* [must not be] interposed for any improper purpose," the two clauses operate independently and the violation of either constitutes a violation of the rule.[45]

The initial inquiry, therefore, is what conduct violates the "frivolousness" or the "improper purpose" clauses of the rule.

1. What conduct violates the "frivolousness" clause?[46]

An attorney or party violates the frivolousness clause if she fails to inquire reasonably into the factual and legal bases of a filing. By filing,

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[41] FED. R. CIV. P. 11. (emphasis added).

[42] *See* Zaldivar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986).

[43] Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) ("the key to rule 11 lies in the certification flowing from the signature to a pleading, motion, or other paper in a law suit. . . . [R]ule 11 . . . deals with the signing of particular papers in violation of the implicit certification invoked by the signature"). *Accord* Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600, 604 (1st Cir. 1988); United Energy Owners v. United Energy Management, 837 F.2d 356, 365 (9th Cir. 1988).

[44] *Zaldivar*, 780 F.2d at 832. *See also* Robinson v. National Cash Register Co., 808 F.2d 1119, 1130 (5th Cir. 1987).

[45] *Zaldivar*, 780 F.2d at 832.

[46] We use "frivolousness" as a shorthand reference. Rule 11 does not use the word

she certifies that she has conducted a reasonable inquiry and that the filing is "well-grounded in fact" and is "warranted by law" or a plausible argument for change in law. The following is a brief conceptual sketch of the separate aspects of the frivolousness clause. It builds upon, often quoting from, the more detailed 1987 article.[47] Other recent articles and studies provide additional depth and guidance.[48]

a. Reasonable inquiry

Rule 11 imposes an affirmative duty to reasonably investigate the basis of a claim, defense or motion before filing. Judicial inquiry on a Rule 11 motion focuses initially on what investigative steps the attorney took before certifying the filing. Whether the investigation was "reasonable" depends on the circumstances of each situation. Relevant factors include:

> [H]ow much time for investigation was available to the signer; whether [s]he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper, whether the pleading, motion or other paper was based on a plausible view of the law; or whether [s]he depended on forwarding counsel or another member of the bar.[49]

The level and type of experience and the resources of the attorney might also be pertinent.[50] The reasonableness standard embodied in Rule 11 thus is flexible. It is to be applied in a manner that accom-

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frivolous. HAW. REV. STAT. § 607-14.5 (Supp. 1990) uses "frivolous" as the standard for attorneys fees awards against *parties* (not attorneys). Coll v. McCarthy, No. 14105, (Haw. Jan. 11, 1991), equates the statutory term "frivolous" with "bad faith." *Id.* at 11. Bad faith was the standard embodied by Rule 11 prior to its recent amendment.

[47] *See* Yamamoto, *Case Management*, *supra* note 20, at 432-38 for a more thorough discussion.

[48] *See* Vairo, *supra* note 6; Schwarzer, *Revisited*, *supra* note 4; Tobias *supra* note 12.

[49] FED. R. CIV. P. 11 advisory committee's note.

[50] Yamamoto, *Case Management*, *supra* note 20, at 433. At least two federal courts have identified the level and type of legal experience of counsel as a relevant factor. *See, e.g.*, McQueen v. United Paperworkers Int'l Union Local 1967, No. C-1-84-1196 (S.D. Ohio, Feb. 26, 1985) (inquiry into expertise attorney may aid court in assessing reasonableness of counsel's conduct under rule 11); Huerrig & Schromm, Inc. v. Landscape Contractors Council, 582 F. Supp. 1519 (N.D. Cal. 1984) (sanctions appropriate where the two attorneys who signed the complaint had seven and twelve years experience and held themselves as labor law specialists, thus raising strong inference that their bringing of action was for improper purpose).

modates the realities of law practice and should not impose unduly onerous or unrealistic investigative burdens upon counsel.[51]

b. Well-grounded in fact

For most filings, reasonable factual inquiry includes thorough discussions with the client and important witnesses[52] and a review of available documents.[53] Rule 11 is designed to eliminate the "file first, ask later" approach, it does not, however, require the equivalent of substantial discovery before filing. Where a party and attorney are unable to obtain important information through informal investigation, they have discharged their duty of reasonable inquiry.[54] It is the omission or misstatement of material fact, avoidable through ordinary investigation and analysis that is the focal point of the reasonable factual inquiry requirement.[55]

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[51] How will judges actually account for the realities of law practice in the context of Rule 11 standards? The answer touches upon several interrelated variables: the judge's commitment to Rule 11's purposes, the judge's perception of the demands of law practice and the judge's sense of what was fair to have asked of the particular attorney in light of his experience and resources. Yamamoto, *Case Management*, *supra* note 20, at 433.

[52] Wold v. Minerals Eng'g Co., 575 F. Supp. 166 (D. Colo. 1983) (personal interviews with client and key witnesses).

[53] Florida Monument Builders v. All Faiths Memorial Gardens, 605 F. Supp. 1324 (S.D. Fla. 1984).

[54] *See* Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987)(reasonableness of plaintiff's factual inquiry must be assessed in light of the availability of relevant information); Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1083 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988)("The amount of investigation required by Rule 11 depends both on the time available to investigate and the probability that more investigation will turn up important evidence; the Rule does not require steps that are not cost justified."); Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866, 875 (5th Cir. 1988) (*en banc*)("The determination of whether a reasonable inquiry into the facts has been made in a case will, of course, be dependent upon the particular facts; however, the district court may consider such factors as the time available to the signer for investigation . . . [and] the feasibility of a prefiling investigation. . . . "); Mohammed v. Union Carbide Corp., 606 F. Supp. 252, 262 (E.D. Mich. 1985)("The difficulty of investigating prior to the initiation of a lawsuit lessens the extent of investigative efforts that an attorney must undertake to satisfy the 'reasonable inquiry' standard.").

[55] *See* S.A. Auto Lube, Inc. v. Juffy Lube Int'l, Inc., 842 F.2d 946, 949 (7th Cir. 1988)(sanctions affirmed on appeal for frivolous removal petition where counsel had ample time, opportunity, and readily available sources to discover the actual corporate

c. Warranted by law or a good faith argument for change in law

Rule 11's frivolousness clause also requires reasonable inquiry to determine whether the filing is warranted by law or a good faith argument for a change in the law. If a filing is *either* "warranted by law" *or* supported by a plausible argument for change in law, the filing is deemed legally reasonable. The attorney need not specify whether her position is based an existing law or on an argument to change the law.[56]

(i) warranted by law

In *Zaldivar v. City of Los Angeles*,[57] the Ninth Circuit addressed the standard for determining whether a pleading or motion is warranted by law. The court noted that under Rule 11's "warranted by law" requirement, the pleader "need not be correct in [her] view of the law."[58] She need only advance a plausible interpretation of the law.[59] Frivolousness will be found only if "it is patently clear that a claim has absolutely no chance of success under existing precedents."[60]

(ii) plausible argument for change in law

Advocacy of positions foreclosed by prevailing precedent does not itself constitute a Rule 11 violation. "[G]ood faith argument[s] for the

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citizenship of one of its co-defendant corporations); *In re* Haw. Fed. Asbestos Cases, 871 F.2d 891, 896-97 (9th Cir. 1989)(motion for summary judgment not well-grounded in fact because testimony by critical witnesses clearly created a disputed issue of material fact); Peabody v. Maud Van Cortland Hill Schroll Trust, 892 F.2d 772, 775 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 3235 (1990)(second petition for removal not well-grounded in fact where prior petition based on same arguments was previously rejected; Ninth Circuit stated that "[a] second presentation of the same, previously rejected, theory to the same court fairly defines 'frivolous'").

[56] Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986).

[57] 780 F.2d 823 (9th Cir. 1986).

[58] *Id.* at 830.

[59] *Id.* at 833.

[60] Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1986), *cert. denied*, 484 U.S. 918 (1987).

The Seventh Circuit states that "[i]n most cases the amount of research into legal questions that is 'reasonable' depends on whether the issue is central, the stakes of the case, and related matters that influence whether further investigation is worth the costs"). Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 932-33 (7th Cir. 1989) (*en banc*).

extension, modification, or reversal of existing law" fall squarely within the bounds of permissible conduct.[61] This good faith standard is a marked departure from the subjective intent standard of former Rule 11. "Good faith arguments" are to be measured objectively: Did counsel, following reasonable inquiry, have *any reasonable basis* for her arguments to change the law?[62]

The interpretive key is the meaning attributed to "any reasonable basis."[63] Some federal courts have interpreted the concept narrowly, implying that an argument for change in law that is not likely to succeed is unreasonable and therefore sanctionable.[64]

That interpretation tends to create problems of chilling creative advocacy and inhibiting common law development and court access—problems discussed more fully in Section III.

Those Rule 11 problems have compelled some commentators to urge and other courts to adopt a much higher sanctioning threshold.[65] Counsel's legal arguments need not bear a high probability of success so long as they are objectively defensible; that is, they have some plausible basis in developing lines of legal or social thought.[66] This interpretation of "any reasonable basis" and "good faith," objectively measured, is consistent with the Advisory Committee's stated intent. Recognizing the importance of access for people with potentially mer-

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[61] FED. R. CIV. P. 11.

[62] *See generally Eastway*, 762 F.2d 243.

[63] Many interpretations have emerged. One commentator asserts that this is "[b]ecause judges have not been guided by a general theory for evaluating the plausibility of legal arguments, they have depended on their own individual notions of good legal argumentation and have produced varied and inconsistent results." Notes, *Plausible Pleadings*, *supra* note 7, at 638.

[64] *See, e.g.*, Szabo Food Serv. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987), *cert. denied*, 485 U.S. 901 (1988); *See also* Notes, *Plausible Pleadings*, *supra* note 7, at 639, citing Rodgers v. Lincoln Towing Serv., Inc., 596 F. Supp. 13 (1984).

[65] *See* Yamamoto, *Case Management*, *supra* note 20, at 437; Note, *The Dynamics of Rule 11*, 61 N.Y.U. L. REV. 300, 324 (1986); Schwarzer, *Revisited*, *supra* note 4, at 1018; Notes, *Plausible Pleadings*, *supra* note 7, at 644-51; Nelken, *Chancellor*, *supra* note 16, at 405; LaFrance, *supra* note 7, at 354; Untereiner, *supra* note 16, at 914; Tobias, *supra* note 12, at 518.

See also Eastway Const. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985), *cert. denied*, 484 U.S. 918 (1987); Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir. 1986) *cert. denied*, 480 U.S. 918 (1987); Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987)(*en banc*); Operating Eng'rs v. A-C Co., 859 F.2d 1336, 1344 (9th Cir. 1988); Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866 (5th Cir. 1988)(*en banc*).

[66] Yamamoto, *Case Management*, *supra* note 20, at 437.

itorious although unconventional claims or novel defenses, the comments to the amended federal rule specifically note that Rule 11 is not meant to "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories"[67]

2. What conduct violates the improper purpose clause?

Rule 11's second clause prohibits filing for an improper purpose. This certification requirement has generated conflict over appropriate standards for judging attorney conduct.

a. Objective standard

An objective test is to be employed for evaluating whether a filing was for an improper purpose. No inquiry need be made into the attorney's or party's subjective state of mind.[68] Instead, courts are to "inquire[] into whether the signer's actions under the circumstances, as objectively measured, manifested a desire to harass or delay.[69]

The focus of inquiry is not on the actual consequences of the signer's act or the subjective intent of the signer. It is on whether reasonable people would agree that under the circumstances the signer "was misusing judicial procedures as a weapon for personal or economic harassment."[70] Several of the federal circuits have adopted the objective standard to decide improper purpose violations.[71] This is the approach we suggest for the Hawaii courts.

b. Relationship of frivolousness and improper purpose clauses

Cases from the Fourth, Fifth, and Ninth Circuits collectively yield the following guide: filings that satisfy the requirements of the frivo-

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[67] FED. R. CIV. P. 11 advisory committee's note.

[68] In determining reasonableness according to an objective standard, a court may consider as a relevant circumstance the signer's subjective beliefs "*if* such beliefs are revealed through an admission that the signer knew that the motion or pleading was baseless but filed nonetheless." *In re* Kunstler, 914 F.2d 505, 519 (4th Cir. 1990) (emphasis added).

[69] FED. R. CIV. P. 11 advisory committee's note.

[70] Zaldivar v. City of Los Angeles, 780 F.2d 823, 830 (9th Cir. 1986).

[71] *See* Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985), *cert. denied*, 484 U.S. 918 (1987); *In re* Kunstler, 914 F.2d 505, 519 (4th Cir. 1990); Sheets v. Yamaha Motors Corp., U.S.A., 891 F.2d 533 (5th Cir. 1990); *Zaldivar*, 780 F.2d 823 (9th Cir. 1986).

lousness clause are rarely sanctionable under the improper purpose clause.[72] Only in unusual circumstances should the filing of a pleading or motion which is well-grounded in fact and law constitute sanctionable conduct, even though one of the filer's motive for filing may have been other than to advance the merits of the asserted position. Thus, for example, the "political inspiration" for a suit "does not necessarily mean that the action is 'improper.'"[73]

Complaints particularly are to be scrutinized with extreme caution.

> [T]he reason . . . is that the complaint is . . . the vehicle through which [plaintiff] enforces his substantive legal rights. Enforcement of those rights [also] benefits . . . the public, since bringing meritorious lawsuits by private individuals is one way that public policies are advanced. As we recognized in *Zaldivar*, it would be counterproductive to use Rule 11 to penalize the assertion of non-frivolous substantive claims, even when the motives for asserting those claims are not entirely pure.[74]

The Ninth Circuit has outlined two of the relatively rare situations where "non-frivolous" filings might nevertheless be deemed sanctionable harassment. First, the "filing of excessive motions . . . even if each is well grounded in fact and law, may under particular circumstances be 'harassment' under [r]ule 11."[75] Second, the "filing of [an] action in federal court, after the rejection in state court of its legal premise" might constitute harassment "under the second prong" of Rule 11, provided that there "exist[s] an identity of parties in the successive claims, and a clear indication that the proposition urged in the second claim was resolved in the earlier one."[76]

3. What is the time frame for assessing sanctionable conduct?

Whether an attorney's conduct is sanctionable is determined by the attorney's conduct up to the time of filing. This "measuring point" is

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[72] *See generally* Westlake N. Property Owners v. Thousand Oaks, 915 F.2d 1301 (9th Cir. 1990); Townsend v. Holman Consulting Corp., 914 F.2d 1136 (9th Cir. 1990) (*en banc*); Sheets v. Yamaha Motors, Corp., U.S.A., 891 F.2d 533, 538 (5th Cir. 1990); *In re* Kunstler, 914 F.2d 505, 518 (4th Cir. 1990).

[73] *Zaldivar*, 780 F.2d at 834.

[74] *Townsend*, 914 F.2d at 1140. *See also Kunstler*, 914 F.2d at 520 (urging courts to "exercise special caution when evaluating a signer's purpose under Rule 11).

[75] Yamamoto, *Case Management*, *supra* note 20, at 440.

[76] *Id.* The Fifth Circuit has similarly held that "[a]lthough the filing of a paper for an improper purpose is not immunized from rule 11 sanctions simply because it is well grounded in fact and law, only under unusual circumstances—such as filing of excessive motions—should the filing of such a motion constitute sanctionable conduct." Sheets v. Yamaha Motors Corp., U.S.A., 891 F.2d 533, 538 (5th Cir. 1990).

suggested by the language of the rule[77] and is consistent with the Advisory Committee's comment that "[t]he court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring into what was reasonable . . . at the time the [filing] was submitted."[78]

The certification requirements of new Rule 11 are thus tested at the time of filing.[79] State courts such as Hawaii's are therefore encouraged not to impose a continuing obligation to reevaluate a pleading, motion, or other paper after filing. This position is consistent with the Advisory Committee's comment and the rulings of federal courts generally.[80] Imposing a continuing obligation to reevaluate would encourage Rule 11 motions whenever later discovery contradicts earlier stated positions.

Rule 11 does embody an indirect reevaluation requirement. Rule 11 requires that reasonable inquiry support each filing.[81] A party or attorney is sanctionable for *subsequent* filings that continue to assert a claim, defense or argument that has proven, through subsequent discovery or investigation, to be completely meritless.

4. Must the entire filing be "frivolous"?

Professor Yamamoto posed the following questions in 1987:

> Must every allegation in a complaint (or every argument in a motion) fail the reasonable inquiry test before rule 11 is violated? Or does an "unreasonable" claim (or argument) in an otherwise well-grounded filing constitute a rule 11 violation as to the unreasonable part?[82]

In his answer to these questions, Professor Yamamoto rejected the then Ninth Circuit approach that the "entire pleading, motion, or other

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[77] Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

[78] FED. R. CIV. P. 11 advisory committee's note. *See* Yamamoto, *Case Management*, *supra* note 20, at 437.

[79] Yamamoto, *Case Management*, *supra* note 20, at 437.

[80] *Oliveri*, 803 F.2d at 1274; Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866, 875 (5th Cir. 1988) (*en banc*); Schoenberger v. Oselka, 909 F.2d 1086, 1087 (7th Cir. 1990); Corporation of the Presiding Bishop v. Associated Contractors, 877 F.2d 938, 942 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 1133 (1990).

[81] *Thomas*, 836 F.2d at 874. *See also* Pantry Queen Foods v. Lifschultz Fast Freight, 809 F.2d 451, 454 (7th Cir. 1987).

[82] Yamamoto, *Case Management*, *supra* note 20, at 438.

paper must fail'' before sanctions are to be imposed.[83] Instead, he argued that even though some of the assertions in a filing met the reasonable inquiry requirement, those that did not should be subject to Rule 11 sanctions.[84] Yamamoto reasoned that this approach better addressed the problem of ''undue litigant and court costs arising out of the shotgun method of litigating.''[85]

The Ninth Circuit has since reversed its position, as has Professor Yamamoto.[86] In *Townsend v. Holman Consulting Corp.*, a majority of the court, sitting *en banc*, recently overruled *Murphy v. Business Cards Tomorrow, Inc.*[87] which advanced the ''pleading as a whole'' rule. The majority held that each aspect of a filing must pass Rule 11 muster, explaining that ''[i]t would ill serve the purpose of deterrence to allow, as does *Murphy*, a 'safe harbor' for improper or unwarranted allegations.''[88] *Townsend* brought the Ninth Circuit into accord with the Second and Seventh Circuits.[89]

Judge Canby's concurring opinion in *Townsend* articulates a contrary approach, one that we now suggest the state courts seriously consider. Judge Canby opted for the ''pleading as a whole'' approach.[90] Based on a literal reading of the rule, which provides that the attorney signing a document certifies that ''it'' is well grounded in fact and law, he concluded that the language of the rule requires that the filing be read in its entirety.[91] Sanctions are appropriate only if the ''filing as a whole'' can be viewed as frivolous.

Judge Canby recognized that the *Murphy* rule was subject to abuse by attorneys who might file one plausible claim amidst several frivolous

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[83] *Id.* at 438 (citing Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1540 (9th Cir. 1986)).

[84] Yamamoto, Case Management, *supra* note 20, at 438-39 (citing Rodgers v. Lincoln Towing Serv., Inc., 771 F.2d 194 (7th Cir. 1985)).

[85] *Id.* at 439.

[86] Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1141 (9th Cir. 1990)(*en banc*).

[87] 854 F.2d 1202 (9th Cir. 1988).

[88] *Townsend*, 914 F.2d at 1142.

[89] *See* Oliveri v. Thompson, 803 F.2d 1265, 1280 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987); Melrose v. Shearson/Am. Express, Inc., 898 F.2d 1209 (7th Cir. 1990).

[90] Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1145 (9th Cir. 1990)(*en banc*)(Canby, J., joined by Pregerson, J., concurring).

[91] *Id.* at 1146.

ones. He nevertheless concluded that the *Murphy* rule constituted a lesser evil than the majority's approach.[92]

> A party against whom a well-founded claim has been pleaded must, in any event, come into court and defend against that claim. The major goal of Rule 11, to avoid wholly unjustified litigation, has been achieved. . . . It may be an inconvenience for such a defendant to have to address other, frivolous claims, but that can be done by motion, usually without great hardship. Often the facts will be clearer at the time of such a motion, and if the plaintiff persists in opposing dismissal or summary judgment when it is apparent that a claim is without foundation, that is the time to consider sanctions.[93]

Judge Canby evinced special concern about the effects of majority's approach—that it would chill vigorous advocacy and stimulate satellite litigation by encouraging attorneys to scrutinize every filing "to find isolated deficiencies that may lead to a shifting of fees."[94]

> An attorney or litigant who files a complaint with several well-founded claims may be subjected to sanctions for tacking on an additional claim that is determined to be not well-founded. Such a flexible rule invites after-the-fact scrutiny of pleadings to find isolated deficiencies that may lead to a shifting of fees. . . . [T]he lack of a "bright line" rule is sure to lead to widely varying standards being applied by trial courts, and to greatly increased satellite litigation over sanctions.[95]

Judge Canby's comments are insightful, perhaps compelling. At the same time, the majority's view is understandable—that the "pleading as a whole" rule tolerated, and arguably even encouraged, the inefficient shotgun approach to litigation. The call is a close one. Our suggestion is that the state courts, such as Hawaii's, follow Judge Canby's approach essentially for the reasons he articulated.[96] In addition

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[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1146 (9th Cir. 1990)(*en banc*)(Canby, J., joined by Pregerson, J., concurring).

[96] The counter-argument can be summarized as follows. Under Rule 11, the attorney signing certifies that she has made reasonable inquiry into her document's factual and legal foundations. Rule 11 mandates, therefore, reasonable inquiry as to each claim or argument asserted. The burden thereby imposed should not be undue because Rule 11 also takes into consideration various factors which define "reasonable" inquiry under the unique circumstances of each case. Moreover, since courts are instructed to focus on what was reasonable at the time of filing, the document "reasonably" well-founded at the time of filing but later discovered to be meritless is insulated from Rule 11 sanctions.

to those reasons, the "pleading as a whole" approach is consistent with the conception of Rule 11 as an extraordinary remedy for clear misfilings.[97] The high threshold reflected in this approach is likely to discourage nitpicky scrutinizing of each filing and dampen potential attorney tendencies toward commonplace use of Rule 11. It focuses inquiry onto the prefiling conduct of the attorney in justifying the filing as a whole. And it does not discourage the common and seemingly appropriate practice of asserting one solidly grounded position along with one that "pushes the envelope."[98]

B. Persons Sanctionable

According to Rule 11, sanctionable persons include "the attorney, the party, or both."[99] When should the attorney be sanctioned? The client/party? Or both? If the attorney is sanctioned, can her firm also be sanctioned? We start with a premise not readily apparent from the text of Rule 11: the person responsible for the frivolous filing should be the person sanctioned.[100]

1. The attorney, the party or both

The attorney normally is, and should be, the person sanctioned. In most instances, the attorney prepares and signs the document filed.

When is a client/party sanctionable? Reported decisions imposing sanctions against a client alone are rare.[101] Sanctions against a client/party are imposed even though the client itself did not sign the document filed.[102] Client sanctions thus run counter to the notion that Rule 11 imposes obligations upon the *signer* of the filing. This apparent inconsistency is resolved by agency theory.[103] The signing attorney is acting as an agent of the client.

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[97] *See infra* Section III.

[98] *See The Right Stuff* (the movie). *See infra* Section III about Rule 11's potential for chilling vigorous advocacy.

[99] FED. R. CIV. P. 11.

[100] *See* Untereiner, *supra* note 16, at 910.

[101] Vairo, *supra* note 6, at 227.

[102] Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558, 569-70 (1986); Lloyd v. Schlag, 884 F.2d 409 (9th Cir. 1989).

[103] "Even though it is the attorney's signature that violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client." Cross & Cross Properties v. Everett Allied Co., 886 F.2d 497 (2d Cir. 1989). *See generally* Link v. Wabash, 370 U.S. 626 (1962) (client bound by attorney's decisions under agency theory).

Problems arise, however, with agency theory. Client control over a filing is usually minimal. The attorney selects the legal arguments, sorts relevant from irrelevant facts and prepares the filing. The attorney usually decides whether to file and what to assert. For this reason, the Second Circuit has limited the application of agency theory. It has held that the district courts may not sanction a client unless the party moving for sanctions shows that the client had "actual knowledge that filing the paper constituted wrongful conduct."[104] We encourage serious consideration of this approach.[105] Caution is thus in order whenever a court is contemplating sanctions against a client/party.[106]

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[104] Cross & Cross Properties v. Everett Allied Co., 886 F.2d 497, 505 (2d Cir. 1989). Relying upon a statutory prohibition against "frivolous" filings, the Hawaii Supreme Court recently held that sanctions against a *party* are appropriate if the filing is "so manifestly and palpably without merit, so as to indicate bad faith on the [pleader's] part such that argument to the court [is] not required." Coll v. McCarthy, No. 14105, slip op. at 11 (Haw. Jan. 11, 1991).

In addition, the Eleventh Circuit has held that if sanctions against a client are proposed, specific notice to the client must be given, because the client is probably unaware that Rule 11 even exists. Donaldson v. Clark, 819 F.2d 1551, 1560 (11th Cir. 1987)(*en banc*).

[105] The Ninth Circuit's approach differs: the circuit applies a strictly objective standard to both attorneys and clients. Lloyd v. Schlag, 884 F.2d 409 (9th Cir. 1989). Sanctions imposed on a client/party were thus affirmed on an appeal from an order of the United States District Court for the District of Hawaii, even though the client apparently made a good faith mistake regarding the law. *Lloyd*, 884 F.2d 409. *Lloyd* involved alleged copyright infringements. However, the transfers of the copyrights were not filed with the United States Copyright Office prior to the commencement of the suit. The Ninth Circuit stated that "[t]he fact that Lloyd himself made a good faith error of law provides no refuge." *Id.* at 413.

Apparently, Lloyd's attorney did not conduct any independent research to verify whether the copyright laws had in fact been complied with before suit was filed. The opinion is unclear, however, as to whether Lloyd's attorney was also sanctioned for merely relying on his client's representations. If only the client was sanctioned in *Lloyd*, then this case should be viewed as an anomaly which should not be followed by the Hawaii courts.

Again, we urge the Hawaii courts to adopt, or at least to seriously consider, the Second Circuit's more cautious approach. It is noteworthy that the United States Supreme Court has recently granted *certiorari* to review the appropriateness of the objective standard as applied to clients/parties. *See* Business Guides, Inc. v. Chromatic Communications Enter., Inc. and Michael Shipp, 892 F.2d 802 (9th Cir. 1989), *cert. granted*, 110 S.Ct. 3235 (1990).

[106] Parties sanctionable under Rule 11 also include persons who proceed *pro se*. The circuits do not appear to have carved out any exception for *pro se* these types of litigants. *See* Bryer v. Creati, 915 F.2d 1556 (1st Cir. 1990) (per curiam)(Rule 11 by

The court should, as a preliminary matter, determine which clause of Rule 11 has been violated and then determine responsibility for the violation.[107] When a filing is not warranted by law, the attorney should generally be the person sanctioned. In these situations, the client would not normally be in a position to judge the validity of, or to urge the attorney to make, questionable legal arguments.[108]

When, however, a filing is not well-grounded in fact, the attorney or client, or both, can properly be sanctioned. In these situations, the court will generally have to make a more detailed inquiry into responsibility for factually unsupported filings. If a client knowingly provides false information, then the client might properly be sanctioned. The attorney would also be sanctionable if under the circumstances she failed to inquire sensibly about the client's sources of information.[109]

2. *The law firm*

In *Pavelic & LeFlore v. Marvel Entertainment Group*,[110] the district court imposed Rule 11 sanctions on an attorney and that attorney's firm after finding that the forgery claim in plaintiff's complaint had been insufficiently investigated by counsel.[111] The Supreme Court reversed the order of sanctions as to the law firm.[112] The Court reasoned that sanctions against a signer's law firm conflicted with the clear language of the rule imposing sanctions upon "the *person* who signed [the paper]."[113]

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its terms applies to *pro se* parties); Vukadinovich v. McCarthy, 901 F.2d 1439, 1445 (7th Cir. 1990) (Rule 11 applies to anyone who signs a paper).

This treatment is consistent with the Advisory Committee Notes which state that "[a]mended Rule 11 continues to apply to anyone who signs a pleading, motion, or other paper." FED. R. CIV. P. 11 advisory committee's notes. However, the Advisory Committee Notes also appropriately provide that "[a]lthough the standard is the same for unrepresented parties . . . the court has sufficient discretion to take account of the special circumstances that often arise in *pro se* situations." *Id.*

[107] *See* Untereiner, *supra* note 16, at 914-16 (establishing guidelines for deciding which party should be sanctioned).

[108] *Id.* at 914.

[109] *Id.* at 915-16.

[110] 110 S.Ct. 456 (1989).

[111] *Id.* at 457.

[112] *Id.* at 460.

[113] *Id.* at 459.

C. Types Of Sanctions

What type of sanction is appropriate for a Rule 11 violation? This question has vexed the rule's drafters,[114] the circuit courts[115] and commentators.[116] The confusion is traceable initially to the text of Rule 11. The rule mandates sanctions for violations. It also, however, gives the trial court enormous discretion to fashion an "appropriate" sanction.[117]

The rule provides little guidance to the trial court about what constitutes an "appropriate" sanction. The only type of sanction identified is "a reasonable attorney's fee."[118] Perhaps for that reason the federal courts have tended to impose monetary sanctions.[119] The absence of other types of sanctions in the text of Rule 11 is unfortunate. Out of sight, out of mind may be the operative principle. Courts rarely impose sanctions in the form of apologies, reprimands, community service or continuing education. The federal courts' emphasis on monetary sanctions and the sizeable amount of well-publicized awards[120]

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[114] The Advisory Committees's Call for Comments on Rule 11, at 4 (July 24, 1990). Question #6 of the Call specifically addresses the "appropriateness" of the range of sanctions imposed.

[115] The sheer volume of circuit court opinions addressing the appropriateness of the type of sanction is indicative of the confusion. *See, e.g.*, Oliveri v. Thompson 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 480 U.S. 918, 107 (1987); *In re* Kunstler, 914 F.2d 505 (4th Cir. 1990); Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866 (5th Cir. 1988)(*en banc*); Foval v. First Nat'l Bank of Commerce in New Orleans, 841 F.2d 126 (5th Cir. 1988); Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928 (7th Cir. 1989)(*en banc*); Melrose v. Shearson/Am. Express, Inc., 898 F.2d 1209 (7th Cir. 1990); Matter of Yagman, 796 F.2d 1165 (9th Cir. 1986)(subsequent history omitted); Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987)(*en banc*).

[116] *See* LaFrance, *supra* note 7; Untereiner, *supra* note 16; Tobias, *supra* note 12; Schwarzer, *Revisited*, *supra* note 4; Nelken, *Chancellor*, *supra* note 16; Vairo, *supra* note 6; Yamamoto, *Case Management*, *supra* note 20.

[117] FED. R. CIV. P. 11. "If a . . . paper is signed in violation of this rule, the court, upon motion or upon its own initiative, *shall* impose . . . an *appropriate* sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee." (emphasis added).

[118] *Id.*

[119] *See* Untereiner, *supra* note 16, at 911; Tobias, *supra* note 12, at 499.

[120] *In re* Kunstler, 914 F.2d 505 (4th Cir. 1990) ($123,000); Blue v. United States Dept. of the Army, No. 88-1364 (4th Cir. 1990)($85,000); Matter of Yagman, 796 F.2d 1165 (9th Cir. 1986) (subsequent history omitted)($250,000); Avirgan v. Hull, 705 F. Supp. 1544 (S.D. Fla. 1989)(approximately $1,000,000); Harris v. Marsh, 679 F. Supp. 1204 (E.D. N.C. 1987)($84,000).

have exacerbated Rule 11's potential for chilling vigorous advocacy.[121] Small firm and public interest attorneys are especially impacted.[122] The emphasis on monetary sanctions has also encouraged some courts to view Rule 11 as essentially a fee-shifting device.[123]

The Fifth Circuit has offered an apparently productive approach to the problem of selecting an appropriate sanction. In its *en banc* decision in *Thomas v. Capital Security Services, Inc.*,[124] the Fifth Circuit acknowledged that attorney's fees *may* be the appropriate sanction in a given case. The court observed, however, that a district court's broad discretion in choosing a sanction was designed as a "safety valve" to reduce the pressure imposed by the rule's mandatory sanctioning provision.[125] The court recognized judges' understandable favoring of monetary sanctions in light of the rule's textual reference to attorney's fees.[126] The court nevertheless rejected routine reliance on attorneys' fees as "the appropriate" sanction. It emphasized that a sanction should be fashioned in a manner that furthers the rule's purpose. Since the rule's primary purpose is to make attorneys stop, think and investigate before filing, and not to compensate, the court "specifically adopt[ed] the principle that the sanction imposed should be the least severe sanction adequate" to that purpose.[127]

Examples of "appropriate" non-monetary sanctions are "a warm friendly discussion on the record, a hard-nosed reprimand in open

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[121] Professor Nelken argues that "[b]ecause attorney's fees have so dominated the sanctions picture under Rule 11, and the fees awarded have often been substantial, the chilling effect of the rule's mandatory sanctions provisions is magnified. . . . As long as fees remain the sanction of choice, lawyers will ask for them; and both the volume of sanctions litigation and its chilling effect are unlikely to decline markedly." Nelken, *Chancellor*, *supra* note 16, at 399. *See also* Tobias, *supra* note 12, at 500-01.

[122] *See infra* Section III(B)(2).

[123] *See, e.g.*, Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1988), *cert. dismissed*, 485 U.S. 901 (1988); Hays v. Sony Corp. of Am., 847 F.2d 412, 419 (7th Cir. 1985) ("Rule 11 is a fee-shifting statute"). Professor Vairo comments that "as the awards under Rule 11 become greater, the rule will be seen as a fee-shifting device. As that occurs, there will be a natural increase in Rule 11 motions." Vairo, *supra* note 6, at 204. According to Professor Tobias, "the willingness of attorneys to employ Rule 11 for strategic purposes and to recoup attorney's fees has led to excessive litigation and has created corresponding delay and waste." *See* Tobias, *supra* note 12, at 508; Schwarzer, *Revisited*, *supra* note 4, at 1015-18.

[124] 836 F.2d 866 (5th Cir. 1988)(*en banc*).

[125] *Id.* at 877.

[126] *Id.* at 878.

[127] Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 878 (5th Cir. 1988)(*en banc*).

court, [and] compulsory continuing legal education."[128] As the *Thomas* court noted, "[s]anctions should also be educational and rehabilitative in character and, as such, tailored to the particular wrong. . . . [T]he district court should carefully choose sanctions that foster the appropriate purpose of the rule, depending upon the parties, the violation, and the nature of the case."[129] We suggest that state courts seriously consider the Fifth Circuit's approach in *Thomas*.

Where a fee award is deemed appropriate, the court should explain the basis of the award so that a reviewing court may determine whether the sanction imposed was appropriate.[130] Several factors are relevant: 1) the reasonableness of the fees sought;[131] 2) the minimum sanction necessary to deter future misconduct;[132] 3) the party/attorney's ability to pay;[133] and 4) other "factors relevant to the severity of the Rule 11

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[128] *Id.*

[129] *Id.* at 877. This approach is also advocated by Professor Tobias. "Courts also should levy the kind of sanctions which are the least severe necessary, keeping in mind that there are many alternatives less onerous than attorney's fees, especially non-monetary ones." Tobias, *supra* note 12, at 521. *See also* Vairo, *supra* note 6, at 204. Professor Nelken also asserts that "[t]he Fifth Circuit's formulations of the primacy of deterrence in choosing sanctions under Rule 11 and the importance of fashioning the sanction chosen so that the least 'severe sanction adequate' to the violation is used are essential to mitigating the rule's potential chilling effect." Nelken, *Chancellor*, *supra* note 16, at 398.

[130] *In re* Kunstler, 914 F.2d 505, 523 (4th Cir. 1990); Matter of Yagman, 796 F.2d 1165, 1184 (9th Cir. 1986) (subsequent history omitted).

[131] *Kunstler*, 914 F.2d at 523 (The factors in this analysis were enumerated in this order in White v. General Motors Corp., 908 F.2d 675, 684-85 (10th Cir. 1990), and were relied upon by the Fourth Circuit in this case.). The Ninth Circuit has stated that "an essential part of determining the reasonableness of the award is inquiring into the reasonableness of the claimed fees," and, thus, "[r]ecovery should never exceed those expenses and fees that were reasonably necessary to resist the offending action." *Yagman*, 796 F.2d at 1185; *see also* Melrose v. Shearson/Am. Express, Inc., 898 F.2d 1209, 1216 (7th Cir. 1990).

[132] *Kunstler*, 914 F.2d at 523, 524 (noting that "[i]t is particularly inappropriate to use sanctions as a means of driving certain attorneys out of practice"); *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 878 (5th Cir. 1988)(*en banc*); *White*, 908 F.2d at 684-85.

[133] Professor Vairo observes that "most courts are trying to insure that the sanctions are fair, reasonable, and bear some relation to the party or attorney's ability to pay and responsibility for the offending litigation." Vairo, *supra* note 6, at 229. The Fourth Circuit has even stated that "a monetary sanction imposed without any consideration of ability to pay would constitute an abuse of discretion." *In re* Kunstler, 914 F.2d

violation."[134] In addition, where fees are sought, the moving party has a duty to mitigate expenses.[135]

D. Related Issues

In addition to what constitutes sanctionable conduct, who should be sanctioned and which types of sanctions are appropriate, other technical issues warrant at least brief discussion.

1. When should a Rule 11 motion be filed?

No set guidelines exist for determining when a sanctions motion is to be brought.[136] One federal circuit has held that equitable considerations are the only limits to the trial court's discretion.[137] Another circuit has emphasized that the party moving for Rule 11 sanctions must make the motion within a "reasonable time."[138]

505, 524 (4th Cir. 1990).

The following circuits consider the party's ability to pay a proper factor in determining a fee award: Matter of Yagman, 796 F.2d 1165, 1185 (9th Cir. 1986) (subsequent history omitted) ("ability to pay, in our view, is a relevant factor in determining reasonableness"); Oliveri v. Thompson, 803 F.2d 1265, 1281 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987)("it is well within the district court's discretion to temper the amount to be awarded against an offending attorney by a balancing consideration of his ability to pay"); *White*, 908 F.2d at 685.

[134] *Kunstler*, 914 F.2d at 523 (such other factors include "the offending party's history, experience, and ability, the severity of the violation . . . [and] the risk of chilling the type of litigation involved. . . ."). *Id.* at 524-25; *see also*, *White*, 908 F.2d at 685. This list is not exhaustive.

[135] The duty to mitigate is actually a sub-issue of the "reasonableness" requirement imposed when attorney's fees are sought. The Fourth, Fifth, Seventh, Ninth, and Tenth Circuits have adopted the mitigation requirement. *See In re* Kunstler, 914 F.2d 505, 523 (4th Cir. 1990); Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 879 (5th Cir. 1988)(*en banc*); Melrose v. Shearson/Am. Express, Inc., 898 F.2d 1209, 1216 (7th Cir. 1990); *Yagman*, 796 F.2d at 1185; White v. General Motors Corp., 908 F.2d 675, 684 (10th Cir. 1990). *See also* Tobias, *supra* note 12, at 521; Vairo, *supra* note 6, at 229.

[136] The text of Rule 11 states only that the court shall impose sanctions on a violating party "upon motion or upon its own initiative." FED. R. CIV. P. 11.

[137] Hicks v. Southern Md. Health Sys. Agency, 805 F.2d 1165, 1167 (4th Cir. 1986)("In the absence of an applicable local rule in the district court, the only time limitation arises out of those equitable considerations that a district judge may weigh in his discretion.").

[138] Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600, 604 (1st Cir. 1988) ("Of course, a party should make a Rule 11 motion within a reasonable time.").

The United States Supreme Court recently provided additional guidance. It indicated that the Advisory Committee anticipated that for pleadings the sanctions issue should generally be determined at the end of the litigation, and that for a motion, a reasonable time after the motion is decided.[139]

According to these guidelines, an attorney should not make a Rule 11 request until the allegedly frivolous or improperly motivated filing has been dismissed or denied. For example, a motion to dismiss a complaint should not be accompanied by a Rule 11 request. The tag-along Rule 11 request is premature and inappropriate. The court may find the complaint sufficient and deny the 12(b)(6) motion, in which case the defendant's Rule 11 request itself would be wasteful and possibly sanctionable.[140] At a minimum, we suggest that all Rule 11 requests be raised by motion with supporting memorandum—that a one sentence request at the end of a memorandum without citation or argument be deemed insufficient to trigger an obligation to respond.

A variant of the guidelines offered by the Supreme Court, and one that we suggest that state courts consider, is that all Rule 11 motions be filed at the *end of the litigation*.[141] There are several potential benefits. First, the trial/motions judge will see a complete rather than piecemeal picture of ostensible Rule 11 activity. Second, the time involved in briefing and hearing the motions will likely be considerably less if the motions are consolidated rather than separately pursued. Third, case settlements will likely obviate the need for sanction's motions in many cases.

The principal problem with this "end of litigation" approach is that it may in some instances distort settlement negotiations. The threat of collective Rule 11 motions may occasionally be a strong bargaining chip. Negotiations may be distorted because Rule 11 bargaining will usually address an *attorney's liability* rather than the client's, creating a

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[139] Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447 (1990).

[140] In concept, this type of tag-along Rule 11 motion may or may not be unreasonably grounded in fact or law. Since the plaintiff's complaint is evaluated according to plaintiff's conduct at the time of filing, defendant technically could file a Rule 11 motion anytime after plaintiff filed. The defendant's tag-along motion, however, is still "unreasonable" in another sense. It wastes everyone's time and resources whenever the underlying dispute is resolved against the defendant.

[141] Note, however, that requiring Rule 11 motions to be filed at the end of litigation *does not* abrogate the court's or opposing counsel's responsibility to provide reasonable notice to the offending party that such a motion is being contemplated. *See infra* text accompanying notes 142-48.

potential conflict between attorney and client during settlement negotiations with the opposing party about the *client's* best interests.

It is a close call, warranting careful scrutiny.

2. What process is due?

The Federal Rules Advisory Committee stated that procedure for the imposition of sanctions must satisfy due process.[142] The Advisory Committee did not, however, specify what process is due. Instead the committee noted:

> The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration. In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.[143]

As might be expected the type of process due under Rule 11 varies from circuit to circuit. Several federal circuits hold that Rule 11 does not require a formal sanction hearing.[144] Even those circuits, however, hold that due process requires that the violating party receive notice of the motion for sanctions and an opportunity to "present opposing argument."[145]

In addition to the notice of the motion for sanctions and an opportunity to respond, both of which are required by due process, the Advisory Committee and some circuit courts have addressed another type of notice. They encourage if not require notice to the Rule 11 violator of the violation *before the filing* of a sanctions motion, thereby giving the violator the chance to withdraw the filing or to remedy its

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[142] FED. R. CIV. P. 11 advisory committee's note.

[143] *Id.*

[144] Bryer v. Creati, 915 F.2d 1556 (1st Cir. 1990) (per curiam)("The rule does not contemplate elaborate procedural requirements and does not require a hearing in every case."); Oliveri v. Thompson, 803 F.2d 1265, 1280 (2nd Cir. 1986), *cert. denied*, 480 U.S. 107 (1987)(noting that due process must be afforded in Rule 11 cases, the court concluded that "[t]his does not mean, necessarily, that an evidentiary hearing must be held"); Donaldson v. Clark, 819 F.2d 1551, 1560 (11th Cir. 1987)(*en banc*)("Rule 11 does not require that a hearing separate from trial or other pretrial hearings be held on Rule 11 charges before sanctions can be imposed.").

[145] *Bryer*, 915 F.2d 1556("[w]hat is required is notice and an opportunity to present opposing argument"); *Donaldson*, 819 F.2d at 1560, ("The accused must be given an opportunity to respond, orally or in writing as may be appropriate, to the invocation of Rule 11 and to justify his or her actions.").

defects.[146] Early notice is encouraged to eliminate the need for later sanctions motions.

> Such early notice . . . will serve to warn the attorney that he risks incurring substantial sanctions, which will in turn increase the likelihood that meritless claims and motions will be abandoned and additional money and judicial resources will be saved. This procedure administers the paramount aim of deterrence and, simultaneously, eliminates the danger of an unsuspected punitive award.[147]

Early notice, in any reasonable form,[148] makes eminent sense.

3. Must the judge record findings?

Must the judge record findings if she imposes Rule sanctions? The answer is no and yes. No, findings are not required by the language

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[146] The Advisory Committee Notes state explicitly that "[a] party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so." Notice can from the opposing party, the court, or both. FED. R. CIV. P. 11 advisory committee's note.

In Matter of Yagman, 796 F.2d 1165, 1183-84 (9th Cir. 1986) (subsequent history omitted), the Ninth Circuit stressed the *court's* duty to provide early notice to a violating party. In this particular case, the district court imposed a $250,000 sanction against an attorney for the attorney's misconduct throughout the entire litigation process without once providing notice that the court was contemplating sanctions. The Ninth Circuit reversed and remanded stating that "in situations where a complaint or other paper is obviously and recognizably frivolous when filed, or as circumstances lead the court to strongly suspect that a filed paper may not be well-grounded in fact or law, the court should *at a minimum* provide notice to the certifying attorney that Rule 11 sanctions will be assessed at the end of trial if appropriate." *Id.* at 1183-84 (emphasis in original). *See also Donaldson*, 819 F.2d at 1560.

[147] *Yagman*, 796 F.2d 1165, 1184 (9th Cir. 1986). *See also Donaldson*, 819 F.2d at 1560 ("An attorney or party should be given early notice that his or her conduct may warrant Rule 11 sanctions"). *See also Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 879 (5th Cir. 1988) (*en banc*) (Fifth Circuit's linking of a duty to mitigate damages with a duty to notify early the violator of the violation to allow for self-correction).

[148] *Donaldson v. Clark*, 819 F.2d 1551, 1560 (11th Cir. 1987) (*en banc*) ("We see no basis for requiring that in all instances notice be in writing and with the formality of pleadings."). *See also Thomas*, 836 F.2d at 880 ("In mandating prompt notice, we do not mean to impose upon litigants a duty of notification that requires written notice or notice through the formality of pleadings; nor do we specify a particular time frame in which notice must be given by counsel. Notice may be in the form of a personal conversation, an informal telephone call, [or] a letter. . . ."). The *Thomas* opinion also indicates that a timely Rule 11 motion would satisfy the early notice requirement. However, for the reasons previously discussed in Section II(D)(1), *supra*, tag-along Rule 11 motions should be discouraged.

of Rule 11. Yes, the federal circuits addressing this issue implicitly require findings as a basis for review. Those federal circuits adhere to the view that trial judge findings are essential to appellate review.[149]

The Fifth and Ninth Circuits, for example, take the position that if findings are not made, and the reasons for imposing or rejecting sanctions are not apparent from the record, the case will be remanded.[150] Even circuits that do not specifically adopt the Fifth and Ninth Circuits' approach to a lack of findings require a statement of reasons "when the reason for the decision is not obvious from the record."[151]

Thus, although findings and a statement of reasons are not required by the language of Rule 11, they are deemed necessary for appellate review, "demonstrating that the trial court exercised its discretion in a reasoned and principled fashion."[152] Findings serve additional functions. "[T]hey help to assure the litigants, and incidentally the judge as well, that the decision was the product of thoughtful deliberation; and . . . their publication enhances the deterrent effect of the ruling."[153]

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[149] *See In re* Ruben 825 F.2d 977, 990-91, (6th Cir. 1987), *cert. denied*, 485 U.S. 934 (1988)("A district judge faced with a sanction motion must make certain findings determining an award is appropriate. Careful analysis and discrete findings are required, no matter how exasperating the case.").

For circuit court opinions not explicitly requiring findings, but nevertheless, deeming findings essential for appellate review *see* Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1084 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988); Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 882-83 (5th Cir. 1988)(*en banc*); Lloyd v. Schlag, 884 F.2d 409, 413 (9th Cir. 1989)(on appeal from the United States District Court for the District of Hawaii).

[150] *See Thomas*, 836 F.2d at 883. As the Ninth Circuit in Townsend v. Holman Consulting Corp. explained, "[d]istrict courts have broad fact-finding powers in this area to which appellate courts must accord great deference. But we must know to what we defer; when we are not certain of the district court's reasoning, or when we cannot discern whether the district court considered the relevant factors, we must remand." 914 F.2d 1136, 1144 (9th Cir. 1990)(*en banc*).

[151] *See* Bryer v. Creati, 915 F.2d 1556 (1st Cir. 1990) (per curiam)("In aid of appellate review, 'we do require a statement when the reason for the decision is not obvious from the record'"); *Szabo Food*, 823 F.2d at 1084 ("A serious Rule 11 motion is not a gnat to be brushed off with the back of the hand. This motion was serious; it should have received serious attention; Canteen [the moving party] and this court are entitled to explanations").

[152] Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 883 (5th Cir. 1988)(*en banc*)(quoting Schwarzer, *Rule 11* 104 F.R.D. at 199 [hereinafter Schwarzer, *Rule 11*]).

[153] *Thomas*, 836 F.2d at 883 (quoting Schwarzer, *Rule 11*, *supra* note 152, at 199).

We therefore encourage state courts such as Hawaii's to make findings mandatory. Not only would this aid in appellate review and reduce the need for remands, it would likely encourage careful and deliberate use of the rule.[154]

4. What is the standard of review on appeal?

Professor Yamamoto wrote in 1987 that appellate review has become an important element of judicial efforts to clarify Rule 11 standards.[155] The three-tiered federal standard of review in place in 1987[156] has since been abrogated by the Supreme Court in *Cooter & Gell v. Hartmarx Corp.*[157]

An abuse of discretion standard is now the applicable standard of review for all aspects of a federal district court's Rule 11 decision.[158] *Cooter* proffered two main reasons for the encompassing abuse of discretion standard of review. First, the imposition or denial of sanctions necessarily involves fact-intensive inquiry into the circumstances of the alleged Rule 11 violation. "[O]nly deferential review [gives] the district court the necessary flexibility to resolve questions involving 'multifarious, fleeting, special, narrow facts that utterly resist generalization.'"[159] Second, Rule 11's efficiency goals support an abuse of discretion standard.

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[154] Professor Vairo asserts that "requiring the district court to make findings may lessen the arbitrary use of the rule by leading relatively zealous judges to be more circumspect in finding violations and imposing substantial sanctions." Vairo, *supra* note 6, at 224.

[155] Yamamoto, *Case Management*, *supra* note 20, at 441.

[156] Professor Yamamoto stated that the conceptual "standard of appellate review of Rule 11 decisions is divided into three degrees of deference. First, de novo review is appropriate if the dispute centers upon the legal conclusion that the uncontroverted facts constituted a violation of rule 11. Second, if the facts relied upon by the court are disputed on appeal, review is appropriate under rule 52(a) clearly erroneous standard. Finally, the abuse of discretion standard is applicable to challenges to the appropriateness of the type and extent of the sanctions." *Id.*

In a recent case not involving Rule 11, the Hawaii Supreme Court announced that bad faith determinations are "mixed questions of fact and law," and that fact findings are to be reviewed under the clearly erroneous standard. Coll v. McCarthy, No. 14105, slip op. at 10 (Haw. Jan. 11, 1991). The court also stated, without explanation, that "we review the denial of attorney's fees under the abuse of discretion standard." *Id.*

[157] Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447 (1990).

[158] *Id.* at 2461.

[159] *Id.* at 2460 (quoting Pierce v. Underwood, 487 U.S. 552, 561-62 (1988)).

> Deference to the determination of courts on the front lines of litigation will enhance these courts' ability to control the litigants before them. Such deference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court; it will also discourage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation.[160]

These reasons, according to the Supreme Court, argue for broad trial court discretion and rely upon the wisdom and front line judgment of district court judges. It is noteworthy that the Federal Rules Advisory Committee and various commentators are now questioning whether too much discretion has been invested in district judges.[161]

5. Does Rule 11 Apply on Appeal?

The United States Supreme Court recently ruled that Rule 11 does not authorize an appellate court to award sanctions on appeal.[162] In *Cooter*, the court of appeals held that respondents were entitled to reimbursement for attorney's fees incurred in defending against a frivolous appeal of a sanctions award. The Supreme Court reversed.

The Court held that Rule 11 by its terms did not apply to appellate proceedings.[163] The Court reasoned that "Rule 11 is more sensibly understood as permitting an award only of those expenses directly caused by the filing, logically, those at the trial level."[164] The Court also noted that the Federal Rules of Appellate Procedure placed a natural limitation on Rule 11's scope.[165] And limiting Rule 11's ap-

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[160] *Cooter*, 110 S.Ct. at 2460.

[161] Untereiner, *supra* note 16, at 912; *see also* Advisory Committee Call for Comments on Rule 11 (July 24, 1990).

[162] Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447 (1990).

[163] The Court stated that:

> [Rule 11's] provision allowing the court to include "an order to pay to the other . . . parties . . . reasonable expenses" must be interpreted in light of Federal Rule of Civil Procedure 1, which indicates that the rules only "govern the procedure in the United States district courts." Neither the language of Rule 11 nor the Advisory Committee Note suggests that the Rule could require payment for any activities outside the context of district court proceedings.

Id. at 2461.

[164] *Id.*

[165] On appeal, litigant conduct is governed by Federal Rule of Appellate Procedure 38. The rule provides: "'If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.'" *Id.* at 2461-62.

plication to violations in the district courts served the dual policies of not discouraging meritorious appeals and reducing satellite litigation.[166] Finally, the Court observed that risking one's Rule 11 award in the course of defending it was "a natural concomitant of the American Rule."[167]

In contrast, and for specific reasons, the Ninth Circuit continues to impose Rule 11 sanctions for frivolous appeals.[168] In *Partington v. Gedan*, the Ninth Circuit reviewed its own earlier decision to impose Rule 11 sanctions on appeal.[169] Despite *Cooter*, the court affirmed its imposition of Rule 11 sanctions for an unreasonable appeal. The court deemed *Cooter* inapplicable because *Cooter* did not prohibit a circuit from incorporating Rule 11 standards into its own appellate rules. This the Ninth Circuit had done.[170] The court concluded that Rule 11 sanctions were proper because: 1) Rule 11 was not used as an independent basis of sanctions; and 2) the sanctions awarded were under Rule 11 only insofar as it was incorporated into the Ninth Circuit's Rules of Court.[171]

We suggest rejection of the Ninth Circuit's approach. Incorporating Rule 11 into appellate court rules unnecessarily extends the scope of Rule 11 and generates a conflict with existing appellate rules. Hawaii Appellate Rule 38, for example, already authorizes sanctions to curb "frivolous" appeals.[172]

6. *Removal?*

Removal from state to federal court raises three issues. First, whether federal or state Rule 11 sanctions can be imposed when a state court case is removed and subsequently dismissed by the federal court as frivolous; second, whether sanctions may be imposed when a defendant improperly removes an action; and third, whether federal Rule 11 applies when frivolous or improper papers are filed subsequent to a proper removal.[173]

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[166] Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447, 2462 (1990).

[167] *Id.* at 2462.

[168] *See* Partington v. Gedan, 914 F.2d 1349 (9th Cir. 1990) (per curiam).

[169] *Id.* at 1349. The Supreme Court had specifically remanded the case to the Ninth Circuit in light of *Cooter*.

[170] 9TH CIR. R. 1-1.

[171] 914 F.2d at 1350.

[172] HAW. R. APP. P. 38.

[173] The structure of this sub-section is patterned after Professor Vairo's discussion. Vairo, *supra* note 6, at 212.

This first issue is well-settled. Rule 11 does not apply to cases removed from the state courts which are subsequently dismissed by the federal courts as frivolous.[174] In *Kirby v. Allegheny Beverage Corp.*, the Fourth Circuit held that a Rule 11 violation occurs at the time the frivolous paper is "signed".[175] Where a complaint is prepared and signed for state court proceedings, the signer is not subject to the Federal Rules of Civil Procedure at the time of signing.[176] And since later removal divested the state court of jurisdiction, the state court cannot apply its own Rule 11 to impose sanctions after dismissal of the case.[177]

With respect to the second issue, federal Rule 11 does reach improperly removed cases.[178] For example, in *S.A. Auto Lube Inc., v. Jiffy Lube International, Inc.*, the defendant petitioned for removal, wrongly asserting diversity of citizenship.[179] The Seventh Circuit reversed the district court's denial of sanctions, finding defense counsel's pre-filing investigation deficient. The court noted that defense counsel was not pressed for time and did not need to rely on the representations of two other attorneys—simple and readily available sources would have supplied the correct information. "More was required of counsel"[180] prior to removal.

Finally, the law governing the third removal issue is clear: federal Rule 11 governs papers subsequently filed in a properly removed action.[181]

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[174] *See* Kirby v. Allegheny Beverage Corp. 811 F.2d 253 (4th Cir. 1987); Foval v. First Nat'l Bank of Commerce in New Orleans, 841 F.2d 126 (5th Cir. 1988); Schoenberger v. Oselka, 909 F.2d 1086 (7th Cir. 1990); Vairo, *supra* note 6, at 212-13.

[175] *Kirby*, 811 F.2d at 257. *See also* Vairo, *supra* note 6, at 212.

[176] Vairo, *supra* note 6, at 212 ("Because the complaint was not prepared for a federal action, it was not 'signed' in violation of the rule, and therefore could not be the basis for sanctions").

[177] *Kirby*, 811 F.2d at 257. This approach creates an anomaly. If the defendant chose not to remove the case and instead obtained dismissal by the state court, the state Rule 11 would authorize sanctions.

[178] *See* Unanue v. Unanue, 898 F.2d 839 (1st Cir. 1990); Davis v. Veslan Enters., 765 F.2d 494 (5th Cir. 1985); S.A. Auto Lube Inc., v. Jiffy Lube Int'l, Inc., 842 F.2d 946 (7th Cir. 1988). *See also* Peabody v. Maud Van Cortland Hill Schroll Trust, 892 F.2d 772 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 3216, where the Ninth Circuit affirmed the imposition of Rule 11 sanctions against an attorney for improperly petitioning for removal in a Hawaii case.

[179] *S.A. Auto Lube*, 842 F.2d. at 947-48.

[180] *Id.* at 949.

[181] *See* Schoenberger v. Oselka, 909 F.2d 1086, 1088 (7th Cir. 1990). *Cf.* Foval v.

7. Voluntary dismissal?

Can Rule 11 sanctions be imposed after a plaintiff voluntarily dismisses her claim pursuant to Rule 41(a)(1)? The United States Supreme Court recently answered, yes.[182]

In *Cooter*, the Court's majority first decided that a voluntary dismissal under Rule 41(a)(1) does not deprive the district court of jurisdiction to impose Rule 11 sanctions.[183] The majority then announced that Rules 41(a)(1) and 11 are compatible, reasoning that if litigants are allowed to purge their Rule 11 violation by simply dismissing baseless claims, litigants would lose incentive to "'stop, think, and investigate more carefully before serving and filing papers.'"[184]

Justice Stevens dissented, observing that the majority's opinion "vastly expands the contours of Rule 11, eviscerates Rule 41(a)(1), and creates a federal common law of malicious prosecution inconsistent with the limited mandate of the Rules Enabling Act."[185] Justice Stevens contended that Rule 11 and Rule 41(a)(1) work in tandem[186] and that

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First Nat'l Bank of Commerce in New Orleans, 841 F.2d 126, 130 (5th Cir. 1988) ("Rule 11 should not countenance sanctions for pleadings filed in state court in a case later removed to federal court unless, their deficiency having been promptly brought to the attention of the pleader after removal, he (or she) refuses to modify them to conform to Rule 11"). *See also* Vairo, *supra* note 6, at 213.

[182] *See* Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447 (1990).

[183] *Id.* at 2457.

[184] The *Cooter* majority stated:

> Rule 41(a)(1) does not codify any policy that the plaintiff's right to one free dismissal also secures the right to file baseless papers. The filing of complaints . . . without taking the necessary care in their preparation is a separate abuse of the judicial system, subject to separate sanction. . . . Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred. Therefore, a litigant who violates Rule 11 merits sanctions even after a dismissal.

Id.

[185] *Id.* at 2463. (Stevens, J., dissenting).

[186] [Rule 11 and Rule 41(a)(1)] . . . should work in conjunction to prevent the prosecution of needless and baseless lawsuits. Rule 11 requires the court to impose an "appropriate sanction" on a litigant who wastes judicial resources by filing a pleading that is not well grounded in fact and warranted by existing law or a good faith argument for its extension modification or reversal. Rule 41(a)(1) permits a plaintiff who decides not to continue a lawsuit to withdraw his complaint before an answer or motion for summary judgment has been filed and avoid further proceedings on the basis of that complaint.

Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447, 2463 (1990) (Stevens, J., dissenting).

courts are not unduly burdened by frivolous complaints subsequently withdrawn.[187] Justice Stevens concluded, "when a plaintiff has voluntarily dismissed a complaint pursuant to Rule 41(a)(1), a collateral proceeding to examine whether the complaint is well grounded will stretch the matter long beyond the time in which either the plaintiff or defendant would otherwise want to litigate the merits of the claim."[188] Finally, he predicted that the only result of the majority's holding would be to encourage Rule 11 motions and to discourage voluntary dismissals.[189]

The majority's approach is consistent with the text of Rule 11; a violation occurs at the time a paper is signed.[190] It is also likely to serve the rule's general deterrent purpose. The majority's approach is problematical, however, because it seems to encourage Rule 11 litigation and discourage voluntary dismissals. The majority failed to distinguish between complaints that are known to be meritless at the time of filing and those that are subsequently discovered to be meritless. This omission is likely to encourage defense counsel to file Rule 11 motions whenever a plaintiff dismisses her suit under Rule 41(a)(1).

The arguments about both approaches cut in favor and against. It is a close call. In the context of our premise of establishing high rather than low sanctioning thresholds wherever prudent, we suggest that state courts seriously consider following Justice Stevens' approach and not allow Rule 11 sanctions for complaints voluntarily dismissed under Rule 41(a)(1).

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[187] The filing of a frivolous complaint which is voluntarily withdrawn imposes a burden on the court only if the notation of an additional civil proceeding on the court's docket sheet can be said to constitute a burden. By definition, a voluntary dismissal under rule 41(a)(1) means that the court has not had to consider the factual allegations of the complaint or ruled on a motion to dismiss its legal claims.

Id. at 2464.

Justice Stevens also observed that "[i]n those rare cases in which the defendant properly incurs great cost in preparing a motion to dismiss a frivolous complaint, he can lock in the right to file a Rule 11 motion by answering the complaint and making his motion to dismiss in the form of a Rule 12(c) motion for judgment on the pleadings." *Id.* at 2464 n.2.

[188] *Id.* at 2464.

[189] "An interpretation that can only have the unfortunate consequences of encouraging the filing of sanctions motions and discouraging voluntary dismissal cannot be a sensible interpretation of Rules. . . ." *Id.*

[190] *See supra* notes 40-45 and accompanying text.

8. Is a Rule 11 violation also attorney malpractice?

Has the sanctioned attorney by definition committed legal malpractice, exposing her to suit by her own client? Has the sanctioned attorney by definition committed the tort of abuse of process, exposing her to suit by the opposing party. The immediate response that comes to mind is, "of course not." Yet the low threshold sanctioning approach of the Seventh Circuit raises these issues.[191]

For example, in *Hays v. Sony Corp. of America*, the Seventh Circuit observed that Rule 11 itself "defines a new form of legal malpractice" because it "[i]n effect . . . imposes a negligence standard" on the signing attorney.[192] In another case the court stated that Rule 11 "effectively picks up the torts of abuse of process . . . and malicious prosecution."[193] In a third case the court *en banc* noted that "[a]s in tort law, the event sometimes speaks for itself. That is, Rule 11 no less than common law recognizes the doctrine of res ipsa loquitur."[194]

Undoubtedly, this low threshold sanctioning approach of the Seventh Circuit should be rejected. It encourages clients to sue their attorneys and parties to sue opposing counsel. It creates unnecessary conflict in an already highly adversarial process. The mere filing of a Rule 11 motion would place client and attorney in a conflict of interest, since a judge's finding of the attorney's violation of Rule 11 would expose the attorney to an automatic client malpractice action.[195]

III. Avoiding The Pitfalls: Rule 11 As An Extraordinary Remedy To Be Cautiously Employed[196]

Specific Rule 11 concerns have emerged from federal court experience. The Advisory Committee recently called for comments about the excessive cost of Rule 11 litigation and the chilling effects of Rule 11's

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[191] *See* Nelken, *Chancellor*, *supra* note 16, at 388. *See also* Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988); Hays v. Sony Corp. of Am., 847 F.2d 412 (7th Cir. 1988); Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928 (7th Cir. 1989)(*en banc*).

[192] *Hays*, 847 F.2d at 418; *accord Mars Steel*, 880 F.2d at 932; *see also* Nelken, *Chancellor*, *supra* note 16, at 388 n.27.

[193] *Szabo*, 823 F.2d at 1083; *see* Nelken, *Chancellor*, *supra* note 16, at 388 n.27.

[194] *Mars Steel Corp.*, 880 F.2d at 932.

[195] *Eastway Constr. Corp. v. City of New York*, 637 F. Supp. 558, 570 (E.D.N.Y. 1986).

[196] *Operating Eng'rs Pension Trust v. A-C Co.*, 859 F.2d 1336 (9th Cir. 1988).

application.[197] The purpose of this section is to describe these concerns and to offer a conception of Rule 11 that may minimize these problems. The concept we offer is a rule that authorizes sanctions only in "exceptional circumstances." It is a concept now generally embraced by the Second, Third, Fifth and Ninth Circuits. If state courts such as Hawaii's establish early and firmly that Rule 11 only addresses clearly careless or wasteful filings, that it is not to be employed routinely and that it is not meant to inhibit thoughtful and creative lawyering or judicial access for the unpopular or disadvantaged, then Rule 11 may still be a valuable tool of the civil litigation judge.

A. Excessive Rule 11 Litigation And Heightened Adversariness

Responding to wide-spread complaints about excessive Rule 11 litigation, the Federal Rules Advisory Committee recently issued a call for comments about cost and benefits of Rule 11: "Has the financial cost in satellite litigation resulting from the imposition of sanctions perhaps exceeded the benefits resulting from any increased tendency of lawyers to 'stop and think?'"[198]

No definitive answer is yet forthcoming. Some poignant insights, however, may be drawn from preliminary empirical research on federal court experience with the rule.

Statistics paint a picture of substantial Rule 11 litigation. Between August 1, 1983 and December 15, 1987, the federal circuit courts of appeals and federal district courts reported 688 Rule 11 decisions.[199] This number is much lower than the actual Federal Rule 11 activity.[200] Since 1989 the federal circuit courts of appeals formally reported 294 decisions.[201] One recent article estimates that there have been more than 3000 Rule 11 decisions since the rule's amendment in 1983.[202] Many more Rule 11 motions have been filed or threatened and resolved without formal court action.

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[197] Advisory Committee's Call For Comments On Rule 11 (July 24, 1990).

[198] *Id.* at 3.

[199] *See* Vairo, *supra* note 6, at 199.

[200] Judge Schwarzer notes that, aside from the reported decisions, "there are presumably many more unreported rulings granting or denying sanctions under Rule 11." *See* Schwarzer, *Revisited*, *supra* note 4 at 1013. *See also* Burbank, *Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Procedure 11* (1989).

[201] LEXIS, Genfed library, Cir files.

[202] *See* Joseph, *Supreme Court Shapes Rule 11*, 65 TRIAL (Sept. 1990).

This volume of federal cases is explainable on several grounds. Three are prominent. First, some courts have encouraged wide-ranging use of Rule 11 by adopting low thresholds for finding Rule 11 violations. Second, until recently, many Rule 11 standards have been ambiguous. Third, some courts have appeared to use Rule 11 to signal disfavor for the substance of certain types of filings. As an apparent collective result, Rule 11 litigation in some circuits has proliferated.[203] In those circuits Rule 11 might be characterized generally as a fee-shifting mechanism rather than as an extraordinary remedy for clearly ill-conceived or improperly motivated filings. Attorneys are there encouraged to wield the threat of sanctions as a new strategic litigation weapon.

"Low thresholds," as the term is used here, describes court interpretations of Rule 11's technical requirements that encourage findings of Rule 11 violations even in situations where the filing is not clearly ill-conceived or improperly motivated and where the imposition of sanctions runs counter to other established values. For example, some federal courts' interpretations of Rule 11's reasonable inquiry clause threaten to undermine liberal notice pleading standards.[204] Those courts employ Rule 11 to demand pleading with greater specificity of fact and with an earlier commitment to a definite legal theory than the federal rules regime otherwise requires.[205] Rule 11 in those situations encourages a sanctions motion despite a litigant's pre-filing difficulty in obtaining information and despite the notice pleading philosophy of the rules.

For another example, several federal courts have adopted the position that if any single part of a filing violates Rule 11's reasonable inquiry clause, sanctions are appropriate.[206] This position establishes a low threshold for sanctions; it encourages Rule 11 litigation. As discussed earlier,[207] if each part of each filing is subject to potential Rule 11 sanctions, then both the prevailing and losing party in every case will be encouraged to scrutinize every filing in search of some aspect of

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[203] A recent LEXIS search revealed that in the last year-and-a-half the Sixth and Seventh Circuits have reported one hundred and four appellate decisions. (LEXIS, Genfed library, 6Cir and 7Cir files).

[204] Notes, *Plausible Pleadings*, *supra* note 7, at 633.

[205] *See* Yamamoto, *Efficiency's Threat*, *supra* note 4, at 371-72; Notes, *Plausible Pleadings*, *supra* note 7, at 633.

[206] *See supra* text accompanying note 87-89.

[207] *Id.*

any filing that might support a sanctions motion. Applying such a low threshold would undoubtedly stimulate Rule 11 litigation.

For a third example, some courts allow Rule 11 motions to accompany filings addressing the pending underlying dispute. These premature tag-along motions intensify Rule 11 activity.[208]

One attractive approach to the looming problem of excessive Rule 11 litigation is for state courts to embrace the Ninth Circuit's conception of the rule, articulated in *Operating Engineers Pension Trust Co. v. A-C Co.*, as an "extraordinary remedy" to be "exercised with extreme caution"[209]—that is, to adopt high thresholds in interpreting the Rule's frivolousness clause so that wide-ranging Rule 11 litigation and strategic use of the rule during negotiations of the underlying claim are discouraged. Rule 11 motions need not and should not be the norm. High sanctioning thresholds reflect that policy and still authorize sanctions against the attorney who fails files long after the expiration of the statute of limitations, the attorney who files in state court asserting less than the requisite amount in controversy, the attorney who uses a summary judgment motion simply as a discovery tool and the party who deceives counsel and court about critical facts.

Empirical research indicates that even high sanctioning thresholds function to further the deterrence purpose of the rule. The Third Circuit's year-long study of all sanctioning activity in its district courts revealed that the circuit generally employs high sanctioning thresholds (limiting sanctions to "exceptional" cases of frivolousness) and that Rule 11 still has "effects on the pre-filing conduct of many attorneys in this circuit of the sort hoped for by the rule makers."[210]

High thresholds are also likely to decrease sharply the number of sanction requests, minimizing satellite litigation.[211] One example of a high threshold is the principle that the filing "as a whole" (rather than any aspect of a filing) must fail the frivolousness standard to trigger Rule 11 sanctions.[212] Another example is the principle that there should

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[208] *See supra* text accompanying note 139-40.

[209] Operating Eng'rs Pension Trust Co. v. A-C Co., 859 F.2d 1336, 1345 (9th Cir. 1988).

[210] Burbank, *supra* note 200, at 61-62.

[211] The perception that sanctions requests will decrease as a result of high thresholds is premised on the argument that once attorneys realize that only clearly careless or wasteless filings are sanctionable, they will be less inclined to file sanctions motions. Moreover, a sanctions motion that fails the reasonable inquiry test is itself subject to Rule 11 sanctions. *See* Yamamoto, *Case Management*, *supra* note 20, at 441.

[212] *See supra* text accompanying notes 90-98.

be no continuing obligation to reevaluate the reasonableness of documents already filed. Imposing such an obligation would increase the potential for Rule 11 litigation by encouraging parties to seek sanctions whenever a filing turns out to be less substantially supported by fact or law than initially anticipated.[213]

A third example of a high threshold is an expansive definition of "any reasonable basis" for an argument to change the law.[214] The value justification for these and other high thresholds is discussed in greater depth in the next section (Chilling Access to Courts). The interpretive suggestions in Section II regarding technical issues are formed in part by the preference stated here for high rather than low sanctioning thresholds.

Ambiguous standards also contribute to Rule 11's potential to generate satellite litigation. If Rule 11 standards are unclear, litigation will be encouraged because each party will understandably assert the view of Rule 11 most advantageous to it. Trial court time will be required to resolve the conflicts over standards in each case. For example, if the courts ascribe a compensatory rather than deterrent purpose to the rule and emphasize monetary sanctions, Rule 11 may be seen as essentially a fee-shifting device, encouraging sanctions motions as every prevailing party attempts to recoup its attorney's fees.[215]

Similarly if ambiguity persists about whether there exists a continuing obligation to reevaluate a filing, sanctions litigation will be encouraged whenever subsequent discovery reveals the inadequacy of the initial filing. The increase in Rule 11 litigation will, in turn, increase the likelihood of appeals as the lower courts and litigants attempt to ascertain the standards for Rule 11 application.

The statistics available suggest an overabundance of sanctions motions in certain federal courts. One apparent result is cost that exceeds benefit. Another is that Rule 11 threats among attorneys abound, intensifying already intense adversarial relationships. Still another result is public perception that the bar has simply created another "cottage industry" for lawyers.[216] Excessive Rule 11 litigation would likely pose a very real threat to the resources and integrity of a state's judicial system. The questions, therefore, are whether overuse will continue in

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[213] *See supra* text accompanying notes 77-81.

[214] *See supra* text accompanying notes 61-67.

[215] *See supra* text accompanying notes 118-23.

[216] Vairo, *supra* note 6, at 199.

some federal courts and, more important, whether overuse will characterize Rule 11 in state courts such as Hawaii's.

The answer to these questions appears to be yes, unless Rule 11 is interpreted and applied in the "exceptional" manner suggested by *Operating Engineers*.

B. Chilling Effects

Rule 11's asserted chilling effect has two distinct dimensions.[217] First, the rule, it is argued, inhibits vigorous and creative lawyering, thereby stifling the development of the common law;[218] and second, the rule poses special threats to small plaintiffs' attorneys and to public interest and pro bono attorneys, thereby inhibiting court access for certain social groups, especially those asserting novel legal theories or reordered social understandings in the form of legal rights.[219]

Judge Schwarzer questions whether federal Rule 11 has chilled advocacy.[220] Others caution that it is either too soon to discern the implications of available statistics or unwise to over-rely on them.[221] The data and commentary of numerous observers, however, indicate that federal Rule 11 has to some extent chilled creative advocacy and disproportionately affected certain types of litigants and attorneys.[222]

Federal and state courts, of course, differ in many respects, and federal question litigation may more often than state litigation navigate through the thicket of social policy issues. State courts, nevertheless, are being called upon increasingly to resolve such issues in the context of environmental conflicts, wrongful job terminations, state law discrimination claims, initiative and referendum challenges, tort and insurance reforms and the like. The impact of Rule 11 on vigorous and creative advocacy and on the accessibility of state courts is likely to be a Rule 11 issue, if not the Rule 11 issue, for the 1990s.

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[217] *See* Yamamoto, *Efficiency's Threat*, *supra* note 4, at 352.

[218] *Id.* at 351, 362; *see also* LaFrance, *supra* note 7, at 342.

[219] Yamamoto, *Efficiency's Threat*, *supra* note 4, at 352; *see also* Tobias, *supra* note 12.

[220] Schwarzer, *Revisited*, *supra* note 4, at 1017.

[221] Tobias, *supra* note 12, at 489 ("It is too soon to discern all of the implications of judicial enforcement for civil rights litigants and attorneys, while caution should be exercised in relying primarily on reported decisions"); Burbank, *supra* note 200, at 99 (caution should be used in relying on statistics of published cases).

[222] *See* Yamamoto, *Efficiency's Threat supra* note 4, at 363; Tobias, *supra* note 12, at 489; Vairo, *supra* note 6, at 201; LaFrance, *supra* note 7, at 353; Notes, *Plausible Pleadings*, *supra* note 7, at 631; *Nelken*, *Chancellor*, *supra* note 16, at 386.

1. Chilling vigorous advocacy and development of common law

"The genius of the common law," according to Professor LaFrance, "has been the capacity to grow and change, and litigation serves a vital role in this process."[223] The development of the many facets of the doctrine of strict products liability is a classic example. LaFrance perceives Rule 11 as interfering with "the healthy process of growth in the law."[224] Indeed, the Third Circuit's recent empirical study noted that Rule 11 has "changed the role of the attorney" and that it tends to reduce the "threshold probability that a lawyer will take a case or pursue an argument."[225] The Federal Rules Advisory Committee was aware of this potential problem from the outset, and it urged that Rule 11 not be applied in a manner that inhibited creative lawyering.[226] Low sanctioning thresholds, however, appear to have that inhibitory effect. Noting that a readily imposed sanction has "implications well beyond [the] particular matter," the Ninth Circuit in *Operating Engineers* observed that such a sanction

> would imply that attorneys in general should exercise little, if any, creativity in their representation of clients, that they should not argue for new but plausible interpretations of agreements, and that they should not read ambiguous cases in the way most favorable to their clients.[227]

The mere receipt of a Rule 11 motion by an attorney and client drives a wedge between them. Client confidence is undermined. The motion suggests to the client that its attorney has acted frivolously. The attorney may respond that she was only trying to push the bounds of the law to help the client; and the motion has simply been filed, not granted. Doubt may nevertheless linger. At worst, has the attorney malpracticed? At best, has the attorney exercised questionable judgment? The effect is chilling.

To minimize Rule 11's chill, the Ninth Circuit in *Operating Engineers* restricted sanctions to the "rare and exceptional case" that is "clearly frivolous." Rule 11, the court indicated, "must not be construed so as to conflict with the primary duty of an attorney to represent his or

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[223] LaFrance, *supra* note 7, at 342.

[224] *Id.*

[225] Burbank, *supra* note 200, at 7.

[226] FED. R. CIV. P. 11 advisory committee's note.

[227] Operating Eng'rs Pension Trust v. A-C Co., 859 F.2d 1336, 1344 (9th Cir. 1988).

her client zealously;" the law is "constantly evolving, and effective representation sometimes compels attorneys to take the lead in that evolution."[228] The court drew support for its view from Justice Stevens' concurring opinion in *Talamani v. All-State Insurance Co.*[229] That opinion articulated values of court access and recognized a "strong presumption" against the imposition of sanctions for invoking legal process:

> Incremental changes in settled rules of law often result from litigation. The courts provide the mechanism for the peaceful resolution of disputes that might otherwise rise to attempts at self-help . . . The strong presumption is against the imposition of sanctions for invoking the processes of the law.[230]

State courts have evinced similar concern. The Hawaii Supreme Court recently acknowledged, in imposing a statutory assessment of attorney's fees for a manifest case of frivolousness, that fee awards "may have a chilling effect in deterring the filing of lawsuits based on innovative theories or to modify, extend, or reverse existing law."[231]

2. Discouraging court access for "marginal" litigants

There is a second dimension to Rule 11's apparent chill—a dimension that also implicates values of court access. The Advisory Committee's 1990 Call For Comments on Rule 11 evinces special concern for the Rule's disproportionate impact. The Call elicited comments on the following question: "Is there evidence that the sanctions rules have been administered unfairly to any particular group of lawyers or parties?"[232]

Professor Nelken's study found that plaintiffs were sanctioned four times as often as defendants.[233] The study also revealed that although civil rights filings comprised only 7.6% of the filings for 1983-1985,

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[228] *Id.*

[229] 470 U.S. 1067 (1985) (Stevens, J., joined by Brennan, Marshall and Blackmun, JJ., concurring).

[230] *Operating Eng'rs*, 859 F.2d at 1344 (quoting *Talamani*, 105 S.Ct. at 1827-28).

[231] Coll v. McCarthy, No. 14105, slip op. at 16 (Haw. Jan. 11, 1991). The court also noted that potential chilling effects had to be balanced against legislative intent to "compensate" victims of frivolous filings. *Id.*

[232] Advisory Committee's Call For Comments On Rule 11, at 4 (July 24, 1990).

[233] Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1328, nn. 96-97 (1986) [hereinafter Nelken, *Sanctions*].

civil rights plaintiffs comprised 22.3% of the Rule 11 cases during that period.[234] Professor Vairo's study similarly suggested that Rule 11 is being used disproportionately against plaintiffs, particularly in "civil rights, employment discrimination, securities fraud cases brought by investors, and antitrust cases brought by small companies."[235] That study found that 28.1% of reported Rule 11 cases involved civil rights and employment discrimination cases.[236]

The Third Circuit's recent study acknowledged that sanctions were not routine in the circuit. It nevertheless found that Rule 11 had a markedly disproportionate impact on plaintiffs, especially civil rights plaintiffs.[237] Civil rights plaintiffs and their attorneys were sanctioned at a "considerably higher rate" (47.1%) than other plaintiffs in other cases (8.45%).[238]

This empirical research indicates that ready use of Rule 11 has had a disproportionate impact on federal court plaintiffs generally and on non-mainstream claimants particularly. More frequent sanctions against plaintiffs, the initiators of litigation, might be expected. Some judges and commentators have concluded, however, that Rule 11 has not been wielded neutrally,[239] and that federal court applications of the rule have discriminated against certain classes of plaintiffs and attorneys.[240] In particular, sanctions are more likely to be imposed against claimants who are perceived as socially or politically marginal and against "public interest" attorneys or attorneys representing unpopular clients or causes.[241]

Consider a suit against the city by a Filipino immigrant, now Hawaii resident, asserting discriminatory refusal to hire because of his foreign accent. Lowest level clerk position in the Motor Vehicles Licensing Division. The applicant was educated as an attorney in the Philippines in English and had distinguished military and business careers (speaking regularly in English) before moving to Hawaii. He finished first of 721

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[234] *Id.* at 1327.

[235] Vairo, *supra* note 6, at 200.

[236] *Id.*

[237] Burbank, *supra* note 200, at 61-62, 69.

[238] *Id.* at 69.

[239] *See* Yamamoto, *Efficiency's Threat*, *supra* note 4, at 365 (quoting Judge Carter: "'Rule 11 has not been wielded neutrally' and . . . applications of the rule evince 'extraordinary substantive bias' against certain minority claims").

[240] LaFrance, *supra* note 7, at 353 ("It is not only certain classes of *cases* which are being discriminated against but also certain classes of *attorneys*"). (emphasis in original).

[241] *See* Notes, *Plausible Pleadings*, *supra* note 7, at 631.

Civil Service exam takers for the position. He rated first among short list of eligibles. Ten minute interview. The city administrator and secretary decided not to "recommend him because of his accent." (He later established his communication ability by successfully performing at a mid-level state job requiring detailed information gathering over the phone).

Suit is based on antidiscrimination law.[242] Tough claim. Some unresolved legal questions: Is accent an attribute of race or ancestry? Settled law cuts against applicant: Communication ability is a bona fide job requirement and inability to communicate justifies refusal to hire, and the employer effectively decides whether the applicant can communicate. The applicant must argue for an extension of or change in existing law based on reordered social understandings—that if the best qualified applicant can communicate in English, the employer cannot refuse employment even though the general public dislikes hearing his accent. The majority's preference for a familiar accent is an impermissible basis for refusal to hire.

Publicity. Interest grows. Discovery. The applicant loses at trial. The trial judge apparently rejects discrimination theory of inappropriate reliance on mainstream listener preference.[243]

Should Rule 11 sanctions be imposed upon the applicant and his attorney for filing a claim not "warranted by law" or a plausible argument for change in the law? Should this and similar "marginal" cases be discouraged through the use of sanctions? Some federal courts would probably answer yes to both questions, even though sanctions in the form of an attorneys fees award might bankrupt a struggling public interest firm or solo practitioner.[244]

Why have some federal courts embraced such a stringent approach, adopting low sanctioning thresholds? One possible reason is efficiency—a desire to rid the system of "wasteful" suits not based squarely on settled legal norms. Another possible reason is political outlook—a

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[242] *See, e.g.*, HAW. REV. STAT. § 378-2.

[243] This is a modified account of Fragante v. City and County of Honolulu, 888 F.2d 591 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 1811 (1990). Fragante filed suit in the Hawaii federal district Court alleging violations of federal antidiscrimination law. Fragante's claims could now be brought in state court under state antidiscrimination law. *See* HAW. REV. STAT. § 387 *et seq.* For a discussion of *Fragante* and Rule 11 see Yamamoto, *Efficiency's Threat*, *supra* note 4, at 6.

[244] *See* Szabo Food Serv. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988); Harris v. Marsh, 679 F. Supp. 1204 (E.D.N.C. 1987).

judicial disfavoring of challenges to established public and private institutional authority. Professor Yamamoto has also argued elsewhere that the seemingly harsh application of Rule 11 reflects deeply held values about court access and the significance of the judicial forum for people of lesser power in society who are seeking to restructure social and political relationships.[245]

The choice between high and low Rule 11 sanctioning thresholds may be characterized, in its simplest form, as a choice between competing values of court access. We will not here repeat the arguments for open court access other than to note that in addition to adjudicating recognized "rights," accessible judicial forums at times have served as part of a needed foundation for community-building, for public education, for participation in the negotiation over social values and for the quest for human decency.[246] Justice Stevens perhaps said it best in *Talamani*:

> Freedom of access to the courts is a cherished value in our democratic society. . . . There is, and should be, the strongest presumption of open access to all levels of the judicial system. Creating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant's claim is unmeritorious could only deter the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means.[247]

We suggest that Rule 11 be viewed in this context by state courts when applied to "marginal" litigants seeking reordered social understandings based on modified or new legal principles.[248] Otherwise, the Rule may well disproportionately impact upon small firms and public interest organizations,[249] resulting in "over-deterrence."

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[245] Yamamoto, *Efficiency's Threat*, *supra* note 4, at 379 ("A value judgment is discernible: in a system based on efficiency, plaintiffs outside society's political and cultural mainstream asserting marginal claims are expendable. Their participation in governmental process through litigation is of insufficient value to warrant systemic openness.").

[246] *Id.*

[247] Talamani v. All-State Ins. Co., 470 U.S. 1067 (1985) (Stevens, J., joined by Brennan, Marshall and Blackmun, JJ., concurring).

[248] *See generally* Operating Eng'rs Pension Trust v. A-C Co., 859 F.2d 1336, 1344 (9th Cir. 1988) ("It is essential that free access to the judicial system be maintained; Rule 11 was not intended to impede such access.").

[249] Rule 11 sanctions escalate the professional and financial risk of litigating cases that are important to bring but difficult to win. Contingent fee, reduced fee,

> It has been urged that to require a lawyer to bear the adversary's full legal expenses through discovery and trial because of the lawyer's signing of a pleading with inadequate pre-signing investigation could in some cases be excessive, resulting in "over-deterrence" causing lawyers to be reluctant to assert even marginally well-founded contentions for fear of a sanction colossal in relation to potential benefit to the client served.[250]

The one million dollar sanction against the "public interest" Christic Institute and its attorneys provides poignant illustration of the "colossal" risk.[251]

We have urged the adoption of high sanctioning thresholds in response to potential problems of disproportionate impact and over-deterrence that so worry the Advisory Committee and commentators.[252] Ultimately, whether the courts choose high rather than low Rule 11

> and pro bono lawyers and public interest firms are most likely to represent minorities raising difficult issues. In so doing, they accept a financial risk. If their clients lose, and they often will, the attorneys receive little or no compensation. For a small firm or public interest law organization, the risk can be significant. If losing, however, also means not only uncompensated time spent but also out-of-pocket payment of defendant's attorney's fees, the risk expands exponentially.

Yamamoto, *Efficiency's Threat*, *supra* note 4, at 370.

[250] Advisory Committee Call For Comments On Rule 11, at 4-5 (July 24, 1990). Professor Yamamoto argues that "what has emerged among many lawyers, judges and commentators is the perception that Rule 11's disproportionate impact on civil rights and other public interest cases dissuades attorneys and litigants from contemplating these types of lawsuits. Sanctions in civil rights cases are sometimes imposed in 'very close cases' and are often imposed for plaintiffs' attorneys' assertions of novel legal theories that courts determine to be unfounded." Yamamoto, *Efficiency's Threat*, *supra* note 4, at 363-64 nn. 107-09. *See also* Tobias, *supra* note 12, at 501. Professor Tobias notes that "sizeable awards in even a few cases, especially those involving civil rights, can discourage individuals and lawyers from commencing and continuing civil rights suits because their lack of resources makes them unusually vulnerable." *Id.* at 501.

Similarly, Professor Nelken observes that the central controversy about Rule 11's mandatory sanctioning provision is the potential chilling effect that that provision has exerted on novel or unpopular claims. She acknowledges the sensitive efforts of the circuit courts to avoid chilling vigorous advocacy. She nevertheless found that the "sheer size of some of the sanctions awards affirmed on appeal must concern all but the most self-sacrificing of lawyers. . . ." Nelken, *Chancellor*, *supra* note 16, at 393.

[251] *See* Avirgan v. Hull, 705 F. Supp. 1544 (S.D. Fla. 1989).

[252] Tobias, *supra* note 12, at 501; LaFrance, *supra* note 7, at 342; Yamamoto, *Efficiency's Threat*, *supra* note 4, at 363; Nelken, *Chancellor*, *supra* note 16, at 386; Vairo, *supra* note 6, at 200.

sanctioning thresholds is likely to turn upon value judgments: that court access should not be sharply impeded by the quest for an efficient, streamlined litigation system; that attorney and litigant fear of creative and vigorous advocacy should not be a price for curbs on careless lawyering; that the legal system should not create another strategic litigation weapon or drive a wedge between attorneys and their clients, heightening the adversariness of an already overly adversarial process. People's value preferences may differ and people may therefore disagree about the appropriateness of high rather than low sanctioning thresholds. We have endeavored to frame the larger debate in terms of values and practical effects to aid in the examination of Rule 11's technical aspects and its long-term appropriateness.

IV. Concluding Thoughts

We have suggested that state appellate and trial courts, such as Hawaii's, quickly and firmly establish high rather than low sanctioning Rule 11 thresholds. In doing so, we embraced certain values and minimized others. Section III described our value ordering and endeavored to explain it in the context of problematic federal court experiences with Rule 11 (excessive sanctioning litigation, the creation of a new strategic litigation weapon, heightened adversariness, disproportionate impact, chilling common law development and court access). Section II examined troublesome "technical aspects" of the rule and offered interpretive paths generally consistent with that value ordering. Some judges, attorneys and commentators may disagree with the values we emphasized and, therefore, the suggestions we made. We encourage response. The symbolic and practical impact of new Rule 11 in Hawaii courts and other state courts is likely to be far-reaching and perhaps irreversible. We have written to stimulate debate within a meaningful context.

That context includes developments in procedural theory that suggest what many judges and litigators sense but what traditional legal theory tends to ignore—that seemingly neutral procedures are not always neutral in collective application and that rules of procedure sometimes markedly affect the outcome of cases and the relationships of parties and attorneys.[253] Procedure has social consequences. Rule 11 particu-

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[253] Burbank, Book Review, *The Costs of Complexity*, 85 Mich. L. Rev. 1463, 1472-74 (1987); Yamamoto, *Efficiency's Threat*, *supra* note 4, at 393.

larly must be interpreted, applied and evaluated with this in mind. Literal readings of the rule's myriad phrases, narrow citation of isolated doctrinal statements by waffling federal courts, and strategic uses of the rule simply to gain bargaining leverage are a-contextual approaches to Rule 11. They assume that procedure is merely a game, a technical nicety without social consequence. They ignore the impact of procedure on the tenor of relationships of litigants, on the interactions of attorneys and clients, on the availability of legal services, on the public's perception of the legal system, and on the accessibility of courts as instruments of justice.

Rule 11's purpose is to make attorneys and parties "stop, think and investigate" before filing. That is for the better. State appellate and trial courts might best achieve that purpose, without significant adverse side-effects, by insisting upon *Operating Engineers'* concept of Rule 11 as an extraordinary remedy for only clearly ill-conceived or ill-motivated filings. Consistent with that concept, we believe that attorneys need to "stop, investigate and hesitate" before threatening or filing Rule 11 motions, lest Rule 11's promise be transformed into a destructive force. We suggest, for example, that firms create internal Rule 11 screening committees, of three or so experienced attorneys, to evaluate all potential uses of the rule.

Rule 11's impact on state courts is likely to be felt in myriad ways. State courts such as Hawaii's are in a particularly advantageous position to remake federal court experience in their own image.